LIBRARY
SUPREME COURT. U. S.

No. 825

TRANSCRIPT OF RECORD

Office - Supreme Court, U.S.
FILED
MAR 3 1958
JOHN T. FEY, Clerk

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,424

COMPLETE AUTO TRANSIT, INC.,

Appellant,

versus

DEROY FLOYD, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Georgia.

(ORIGINAL RECORD RECEIVED DEC. 7/56.)

INDEX

	PAGE
Complaint	1
Plaintiffs' Demand for Jury Trial	7
Exhibit "A"—Certificate of Public Convenience and Necessity issued by the Public Service Commission of Georgia to Complete Auto Transit, Inc., dated 6/10/47	8
Answer of Defendant to Complaint	10
Verdict of the Jury	14
Judgment, entered 3/26/56	14
Motion of Defendant to set aside the Verdict and Judgment and for a New Trial	16
Exhibit "A"—Affidavit of Ira Lee Shumans, dated 3/29/56	21
Exhibit "B"—Affidavit of W. C. Grindle, dated 3/29/56	23
Exhibit "C"—Affidavit of Mrs. Juanita Knight, dated 3/29/56	24
Exhibit "D"—Affidavit of Alvin L. Layne, dated 4/2/56	25
Exhibit "E"—Affidavit of P. S. Ringel, T. Ross Sharpe and Alvin L. Layne, dated 3/31/56	27
Order entered 4/3/56 setting above motion for Hearing	29
Order entered 4/18/56 Extending Time for Plaintiffs to Serve Opposing Affidavits	30
Affidavit of G. H. Wood, dated 4/17/56	30
Affidavit of C. C. Harrison, dated 4/18/56	31
Affidavit of John Rogers, dated 4/17/56	32
Affidavit of Eugene F. Edwards, dated 4/18/56	33
Affidavit of J. H. Highsmith, dated 4/19/56	35
Affidavit of R. R. Evans, Quitman Hughes, Devoe D. McLondon and Hawley L. Moss, dated 4/17/56	37

INDEX—Continued

	PAGE
Judgment, entered 8/16/56	38
Notice of Appeal	45
Motion and Order entered 9/20/56 transmitting Original Exhibits to Appellate Court	47
Appellant's Designation of Contents of Record on Appeal	48
Order entered 10/12/56 extending time to File Record on Appeal	50
Transcript of Proceedings	50
Opening Statement made by Mr. Highsmith, Counsel for Plaintiffs	52
Opening Statement made by Mr. Sharpe, Counsel for Defendant	55
Admissions of the Defendant in the pleadings	58
Evidence for Plaintiffs:	
Testimony of E. L. Hatton	59
A. J. Harrington	70
Walter W. Thompson	83
Tom D. Pair	86
Mrs. Tom D. Pair	102
Mrs. Clinton Beck	106
Mrs. Kathy Sue Carter	110
Floyd Hartsfield	120
H. B. Hamrick	134
Deposition of Dr. Benjamin Goldman	146
Testimony of Deroy Floyd	157
Evidence for Defendant:	
Testimony of Sergeant H. B. Hamrick (Recalled)	194
John Tyre	211
Robert Edwards	214
W. I. Grayville	239
Dave Barnard	252

INDEX—Continued

	PAGE
Transcript of Proceedings—(Continued):	
Motion of Defendant after both sides rested for a Directed Verdict and Ruling thereon ..	260
Motion of Defendant for a Mistrial and Ruling thereon	264
Order entered 8/24/56 Approving Transcript of Proceedings	267
Charge of the Court	268
Additional Charge of the Jury	286
Order entered 8/24/56 Approving Charge of the Court	287
Clerk's Certificate	288

COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION.

Civil Action No. 416.

DEROY FLOYD, ET AL.,

versus

COMPLETE AUTO TRANSIT, INC.

1. Plaintiffs, Deroy Floyd, Frances Floyd Dyal and Irene Floyd Williams, are residents of Jeff Davis County, Georgia. Plaintiffs W. D. Floyd, Robby Ray Floyd, Bobby Gene Floyd, David Earl Floyd, James Price Floyd, Hazel Floyd, J. E. Floyd and Jo Ann Floyd, minors, who bring this complaint by and through their next of friend, their father, Deroy Floyd, are also residents of Jeff Davis County, Georgia. All of said plaintiffs live within the Southern District of Georgia.

2. Defendant, Complete Auto Transit, Inc., is a corporation, incorporated under the laws of the State of Michigan.

3. Defendant is a motor carrier engaged in interstate and intrastate transportation on the public highways of the United States and of the State of Georgia; has issued and is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission of the United States

of America and a certificate of public convenience and necessity issued by the Public Service Commission of the State of Georgia, a certified copy of said certificate issued by the Georgia Public Service Commission being hereto attached, marked Exhibit "A".

4. Defendant has appointed and designated P. E. McClatchey, whose address is Hurt Building, Atlanta, Georgia, as its agent upon whom process issued by or under authority of any Court in the State of Georgia, having jurisdiction of the subject matter, may be served in any proceeding at law or equity brought against defendant. This designation was made by defendant in compliance with the provisions of Title 49, Section 321 of the Code of the United States of America, and Section 68-618 of the Code of the State of Georgia.

5. Defendant has damaged plaintiffs, and plaintiffs are entitled to recover from defendant the sum of $165,000.00 by reason of the facts hereinafter alleged.

6. Plaintiffs and defendants are citizens of different States and the amount in controversy, exclusive of interest and cost, exceeds the sum of $3,000.00.

7. On the night of July 27, 1955, at about 9:30 p.m., defendant, by and through its duly authorized driver and employee, Robert G. Edwards, was operating one of its motor vehicle transportation units on Georgia State Highway #15 between Alma and Hazelhurst, Georgia, going towards Hazelhurst. This transportation unit consisted of a 1954 Chevrolet tractor pulling a trailer used for the purpose of trans-

porting new automobiles. Said transportation unit being so operated by defendant had an overall length of not less than 44 feet and a width of not less than 8 feet.

8. At all times herein alleged the said Robert G. Edwards was the authorized driver of said vehicle of defendant, and an employee of defendant acting in the course of his employment.

9. Plaintiff, Deroy Floyd, is a farmer and on said date lived with his wife, Mamie M. Floyd, on a farm located on the southwest side of said highway No. 15 about one-half mile southeast of the City of Hazelhurst. The entrance to said highway from the residence of said plaintiff is about the commencement of a left curve said highway makes just before reaching the city limits of Hazelhurst. At about 9:30 on the night of July 27, 1955, plaintiff and his wife desired to make a telephone call. The nearest telephone was at Davis Filling Station, located on said highway just within the city limits of Hazelhurst. Plaintiff Deroy Floyd's means of transportation was a small Farmall tractor and at said time plaintiff, Deroy Floyd, started to said telephone driving the Farmall tractor on said highway towards Hazelhurst with his wife riding on the tractor with him.

10. Plaintiff, Deroy Floyd, driving said Farmall tractor along said highway with his wife riding thereon, had reached a point just beyond said curve and about two-tenths of a mile southeast of the City of Hazelhurst when defendant's tractor with trailer attached, approaching from behind said plaintiff and his wife, was negligently driven into the rear of the

Farmall tractor on which plaintiff, Deroy Floyd, and his wife were riding. Said tractor and trailer of defendant were driven into the Farmall tractor at such a high rate of speed and with such force that the Farmall tractor was broken in two and Deroy Floyd and his wife, Mamie M. Floyd, were caused to be violently thrown from the Farmall tractor into the ditch on the northeast side of the highway.

11. Plaintiff's said wife, Mamie M. Floyd, being so knocked and thrown from said Farmall tractor into said ditch, received a severe blow on the head causing a concussion of the brain, from which said injury and by reason thereof her death occurred on August 2, 1955, at the University Hospital in Augusta, Georgia.

12. Said highway at the place where defendant's tractor was so driven into said small Farmall tractor, and for at least a mile southeast of said point, has a paved portion of 22 feet in width. Said section of the highway is just outside of the southeast limits of Hazelhurst, in Jeff Davis County, Ga., and has a number of residences on each side, with ways leading from the residences to the highway. The point on the highway where Defendant's tractor was driven into the Farmall tractor is not less than 500 feet northwest of a curve that the highway makes to the left just before entering the city limits of Hazelhurst. At said time and place there was no obstruction on the highway to prevent the driver of defendant's tractor from seeing the Farmall tractor with Deroy and Mamie M. Floyd thereon being driven on said highway in the same direction ahead of defendant's tractor. There was nothing on said highway at said

time and place to prevent defendant's tractor and trailer being turned to the left on said highway and passing the Farmall tractor without running into it. The Farmall tractor when so hit by defendant's tractor was being driven towards Hazelhurst on the extreme right hand side of said highway with its right rear wheel on the unpaved portion of the highway and its left rear wheel not extending into the paved portion of the highway more than 4 feet.

13. At said time and place defendant's tractor in approaching and going around said curve was being driven at a rapid rate of speed of not less than 55 miles per hour, this speed not being reduced in approaching and rounding the curve on said highway above referred to or before running into said Farmall tractor as above alleged.

14. Defendant by and through its said driver and employee was negligent at said time and place and under the circumstances alleged in the following acts, to-wit:

(a) In failing to control the speed of said tractor of defendant so as to avoid running into theFarmall tractor on which Mamie M. Floyd was riding, in violation of Section 68-1626 (a) of the Code of the State of Georgia.

(b) In operating said tractor of defendant in excess of 50 miles an hour in violation of section 68-1626 (b)-(2) of the Code of the State of Georgia;

(c) In failing to reduce the speed of said tractor of defendant when approaching and going around said curve on said highway, in Violation 68-1626(c) of the Code of the State of Georgia;

(d) In failing to pass said farm tractor being driven in the same direction as defendant's tractor, to the left thereof at a safe distance so as to avoid hitting said Farmall tractor on which Mamie M. Floyd was riding, in violation of Code Section 68-1635 (a) of the Code of the State of Georgia;

(e) In failing to keep a proper lookout for other vehicles on the highway ahead so as to see the Farmall tractor with Mamie M. Floyd riding thereon, and to avoid running into said tractor and killing Mamie M. Floyd;

(f) In failing to have said tractor of defendant under control so as to avoid running into the Farmall tractor on which Mamie M. Floyd was riding and thus causing her death;

(g) In running said tractor of defendant into and upon the Farmall tractor on which Mamie M. Floyd was riding and causing her death.

All and each of said acts of negligence on the part of defendant, by and through its said driver and employee, were the direct and promimate cause of the death of Mamie M. Floyd.

15. Plaintiff, Deroy Floyd, was the husband of Mamie M. Floyd at the time of her death and the other named plaintiffs are all of the surviving children of Mamie M. Floyd, deceased.

16. Mamie M. Floyd at the time of her death was 39 years of age with a life expectancy of not less than 28.27 years. Prior to being injured and killed by defendant she was in good health. When in life, for her said husband she performed all the usual duties and services of a wife; and, likewise, for her 10 children, who ranged in age from 4 years to 25 years, the youngest seven being from 4 years to 17 years, she performed all the duties and services of a mother.

To plaintiffs, her husband and children, she was always loving, kind and affectionate, keeping house, preparing meals, washing clothes and doing all things for their welfare and comfort, and in addition, when her time was not occupied with household duties, assisted with the farm work.

17. Plaintiffs are entitled to recover from defendant the full value of the life of Mamie M. Floyd, which is not less than the sum of $165,000.00, in which sum defendant has injured and damaged plaintiffs, and for which sum defendant is indebted to plaintiffs.

Wherefore, Plaintiff Prays:

(a) Judgment against defendant in the sum of $165,000.00, and Cost of Court;

(b) Trial by jury.

(S.) J. H. HIGHSMITH,

Address:
Baxley, Ga.

(S.) GORDON KNOX, JR.,

Address:
Hazelhurst, Ga.

(S.) E. WAY HIGHSMITH,
Attorneys for Plaintiffs.

Address:
Brunswick, Ga.

Filed September 21, 1955.

"EXHIBIT A."

Certificate of Public Convenience and Necessity.

State Seal.
Application No. 6551.

Amended
Certificate No. 1045.
Date: June 10, 1947.
Issued: June 10, 1947.

Upon consideration of the record in the above numbered application, it is therefore Ordered: That authority be and it is hereby granted to: Complete Auto Transit, Inc., whose principal address is 18465 James Counsens Highway, Detroit 35 Michigan to transport Property as herein Limited on and along the following route in the State of Georgia, in accordance with the Rules and Regulations of the Commission and the Georgia "Motor Carrier Act of 1931", approved March 31, 1931;

For the Transportation of automobiles and trucks via truckaway, driveaway and saddle mount methods between points in Georgia for the account of General Motors Corporation.

This Certificate shall remain in effect until the further Orders of the Commission.

By Order of the Georgia Public Service Commission.

(S.) W. R. McDONALD,
Chairman,
(S.) A. O. RANDALL,
(Seal) Secretary.

Georgia,
Fulton County.

I, A. O. Randall, Secretary of the Georgia Public Service Commission, do hereby certify that the foregoing document is a true and correct copy of the original thereof, which is on file with the Commission.

Given under my hand and official seal of the Georgia Public Service Commission, this 18 day of August, 1955.

(S.) A. O. RANDALL,
Secretary.

ANSWER OF DEFENDANT.

(Title Omitted.)

Now comes Complete Auto Transit, Inc., the defendant in the above stated case, and subject to its motions heretofore filed, answers the plaintiff's petition and says:

First Defense.

1. Paragraph 1 of Plaintiff's petition is admitted.

2. Paragraph 2 of Plaintiff's petition is admitted.

3. Paragraph 3 of Plaintiff's petition is admitted.

4. Paragraph 4 of Plaintiff's petition is admitted.

5. Paragraph 5 of Plaintiff's petition is denied.

6. Paragraph 6 of Plaintiff's petition is admitted.

7. Paragraph 7 of Plaintiff's petition is admitted.

8. Paragraph 8 of the Plaintiff's petition is admitted.

9. Paragraph 9 of the Plaintiff's petition is admitted with the following exceptions: The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation concerning the nearest telephone. Said Farmall Tractor was not the only means of transportation which the said Deroy Floyd and Mamie M. Floyd had, since they also owned an automobile.

10. Paragraph 10 of the plaintiff's petition is denied.

11. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the injuries received by Mamie M. Floyd as alleged in Paragraph 11. The defendant admits that the said Mamie M. Floyd was injured in said accident and that she died on the date recited in Paragraph 11 of the plaintiff's petition, but the remainder of said paragraph is denied.

12. Paragraph 12 of the Plaintiff's petition is denied.

13. Paragraph 13 of the Plaintiff's petition is denied.

14. Paragraph 14 and all Sub-paragraphs thereof of the Plaintiff's petition are denied.

15. Paragraph 15 of the Plaintiff's petition is admitted.

16. The defendant admits the first sentence of Paragraph 16 of the Plaintiff's petition. The defendant is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations of said paragraph.

17. Paragraph 17 of the Plaintiff's petition is denied.

Second Defense.

As a second defense the defendant shows that its truck was being operated at a moderate and legal rate of speed, that its driver had just come around a curve in the road, and that said tractor was immediately in front of him, in the middle of the right-hand lane of traffic, and that said tractor was not equipped with a red tail light as required by the law of the State of Georgia, and that the said Deroy Floyd and the deceased were negligent per se in this respect.

Third Defense.

As a third defense the defendant shows that if there was any light burning on the rear of said tractor, it was not red, but was white, and was hidden by the deceased who was standing on the drawbar of said Tractor, which act is negligence per se.

Fourth Defense.

As a fourth defense the defendant shows that said tractor was being used for the purpose of transporting passengers on the highway, which is in violation of the law of the State of Georgia and said act is negligence per se.

Wherefore, the defendant prays that the claim of plaintiff be denied.

SHARP & LAYNE,
By ALVIN L. LAYNE,
Attorneys for the Defendant,
Complete Auto Transit, Inc.,
Lyons, Ga.

P. S. RINGEL,
By P. S. RINGEL,
Attorney for the Defendant,
Complete Auto Transit,
Inc.
Brunswick, Ga.

Affidavit of Service.

Personally appeared before the undersigned, attesting officer, Alvin L. Layne, who on oath deposes and says that he is a member of the firm of Sharpe & Layne, and that he has this day mailed a copy of the foregoing pleading, postage paid, to J. H. Highsmith, Baxley, Georgia, Attorney of record for the Plaintiff, said copy being addressed to the office of said Attorney at Baxley, Georgia, which is his last known address.

This 11th day of October, 1955.
(S.) ALVIN L. LAYNE.

Sworn to and subscribed before me this 11th day of October, 1955.
(S.) MARIE V. ANDERSON,
Notary Public.

Filed October 12, 1955.

VERDICT.

Filed in Office, March 20, 1956, Mary R. Cross, Deputy Clerk.

United States District Court for the Southern District of Georgia, Brunswick Division.

Deroy Floyd, et al., Plaintiff.
v. No. 416.
Complete Auto Transit Company, Inc., Defendant.

We, the Jury, find In favor of the Plaintiff $107,500.00. In favor of the ten (10) Floyd children in the sum of $10,000.00 to each child and the sum of $7,500.00 to the father of the children—viz Deroy Floyd.

March 20, 1956.
(S.) A. W. GRAGG,
Foreman.

JUDGMENT.

Filed March 26, 1956.

In the United States District Court for the Southern District of Georgia, Brunswick Division.

Deroy Floyd, et al., Plaintiffs,
vs. Civil Action No. 416.
Complete Auto Transit, Inc., Defendant.

The above entitled action having been tried before Judge Frank M. Scarlett, and a Jury, of the District

Court of the United States, for the Southern District of Georgia, Brunswick Division, at the U. S. Court House in Brunswick, Georgia, on the 20th day of March, 1956, and the Jury having rendered a verdict in favor of the Plaintiffs and against the Defendant in the sum of $107,500.00, and the costs of the Plaintiffs having been duly taxed in the sum of $....., now on motion of E. Way Highsmith, Attorney for Plaintiffs, it is

Adjudged that the Plaintiffs, Deroy Floyd, Frances Floyd Dyal, Irene Floyd Williams, W. D. Floyd, Robby Ray Floyd, Bobby Gene Floyd, David Earl Floyd, James Price Floyd, Hazel Floyd, J. E. Floyd and Jo Ann Floyd do recover of the Defendant, Complete Auto Transit, Inc., a corporation, the sum of $107,500, with interest at the rate of 7% per annum from March 20, 1956, together with the sum of $..... costs as taxed, making in all the sum of $....., plus interest, and that Plaintiffs have execution therefor.

Dated the 26th day of March, 1956.

(S.) MARY R. CROSS,
Deputy Clerk, U. S. District Court for the Southern District of Georgia, Brunswick Division.

Filed May 30, 1956.

(Title Omitted.)

Comes now the defendant in the above-entitled cause and, within ten days from the entry of judgment, moves this Court to set aside the verdict and judgment herein and to grant a new trial for the following reasons:

(1)

The verdict is contrary to law.

(2)

The gross enormity of the damages awarded unmistakably manifests bias, prejudice and passion by the jury. Defendant shows that the verdict for $107,500.00 is so flagrantly exorbitant as to compel the conclusion that it is excessive as a matter of law and therefore void. Defendant contends that the evidence shows without dispute that the decedent's maximum earnings were not in excess of $1,500 per year. Assuming that she would have been able to have earned that amount for the remainder of her life if she had lived out her normal expectancy, its present value would be $16,400. Defendant contends that an additional sum in excess of $91,000 for the value of her services as a wife and mother is beyond the bounds of reason and justice.

(3)

Said verdict for the plaintiffs resulted in fact from the prejudice and passion of the jury against defendant and the bias of the jury in favor of the plaintiffs.

Defendant shows that on the panel from which the jury was selected there were seven jurors from Hazlehurst in Jeff Davis County, Georgia, and although defendant's counsel struck three of said Hazlehurst jurors, there remained on the jury which tried the case four residents from Hazlehurst, Georgia. Defendant shows that it and other trucking companies engaged in the hauling of automobiles from the Atlanta, Georgia assembly plants to automobile dealers along the east coast of Florida are routed by highway markings directly through the residential and business center of Hazlehurst, which has aroused great resentment among the residents of Hazlehurst, Georgia.

Defendant further shows that the plaintiffs reside in Jeff Davis County within three miles of the corporate limits of Hazlehurst, and one of their attorneys was Gordon Knox, Jr., of Hazlehurst, Georgia, a most highly respected lawyer of that community and the son of a former judge of the superior Courts of the Brunswick Circuit who also lived in Jeff Davis County. According to the 1950 census, Hazlehurst has a population of 2,687 and Jeff Davis County has a population of 9,299. Defendant contends that gross prejudice against the defendant trucking company and undue sympathy for the plaintiffs by their four fellow citizens serving on the jury influenced the jury and brought about the excessive verdict.

Defendant attaches hereto as Exhibits A, B and C the affidavits of Ira Lee Shumans, W. C. Grindle and Mrs. Juanita Knight with respect to the prejudice which exists against defendant by the citizens and residents of Hazlehurst. Defendant also attaches hereto as Exhibit D the affidavit of Alvin L. Layne in support of the other facts alleged herein.

(4)

Improper argument was made to the jury by J. P. Highsmith, the leading counsel for the plaintiffs, in his closing argument as follows:

The said Highsmith had argued at length to the jury that the plaintiffs were asking for only $1.47 per day for each of the eleven plaintiffs He then proceeded to argue that the death of the mother extended to the grandchildren.

At that point the following occurred:

P. S. Ringel, one of the attorneys for the defendant, addressed the Court, saying:

"We move for a mistrial because he has now gone into the grandchildren."

Mr. Highsmith:
"I said the value of the mother to her children extended after the child becomes grown and have children of their own because that mother could help with the children—her grandchildren."

The Court:
"Is there any evidence of that? What has that got to do with it?"

Mr. Highsmith:
"I expect to show by my argument that the mother has a value to the child even after she has children of her own because the value of the mother in helping the child is a valuable service. Is Your Honor holding that is not to be considered by the jury?"

The Court:
"Yes. That has nothing to do with the case."

No other ruling was made by the Court in response to the motion of defendant's counsel for a mistrial. Defendant contends that the verdict itself plainly shows that the jury was influenced in arriving at its verdict by this highly improper argument of the leading counsel for the plaintiffs, and the statement of the Court in response to the question of counsel for the plaintiffs that the jury could not consider the value of the mother in helping care for the grandchildren in estimating damages was insufficient to eradicate the vice of this highly improper argument. Defendant shows that the Court should have sustained its motion for a mistrial on account of this argument or at least rebuked counsel and directly instructed the jury that they should give no consideration to the argument of plaintiffs' counsel that the services to the grandchildren should be taken into account in valuing the life of the deceased.

(5)

Improper argument was made to the jury by J. P. Highsmith, the leading counsel for the plaintiffs, in his closing argument as follows:

"We want you to return a verdict for the full amount of $165,000.00, which is not unreasonable. We want you to stop those trucks from running the farmers off the highway. A verdict in this amount we think will do it."

Immediately P. S. Ringel, one of the attorneys for the defendant, addressed the Court saying:

"We make a motion for a mistrial because he is arguing for punitive damages and the argument is inflammatory."

Mr. Highsmith then replied:

"No, we are not entitled to punitive damages."

Mr. Ringel then said:

"We move again for a mistrial on that ground."

The Court then stated:

"Well, I overrule you on that ground."

Defendant shows that said argument was highly prejudicial and inflammatory and was made for the purpose of inflaming the passions of the jury against the defendant. Defendant shows that there was no evidence that its trucks ran farmers off the highway and said argument was not based on any inference which could be properly drawn from the evidence. Defendant contends that said argument did prejudice the jury against it, and the refusal of the Court to declare a mistrial in effect gave sanction to and approval of the argument.

Defendant attaches hereto as Exhibit B the affidavit of Messrs. T. Rose Sharpe, Alvin L. Layne and P. S. Ringel in support of the allegations contained herein.

Wherefore, defendant prays that the verdict and judgment be set aside and a new trial granted.

This 3rd day of April, 1956.

RINGEL & RINGEL,
(S.) P. S. RINGEL,
(P. S. Ringel),
Gordon Building,
Brunswick, Georgia.
(S.) T. ROSS SHARPE,
(T. Ross Sharpe),
Lyons, Georgia.
(S.) ALVIN L. LAYNE,
(Alvin L. Layne),
Lyons, Georgia.
MARTIN, SNOW & GRANT,
(S.) CUBBEDGE SNOW,
(Cubbedge Snow),
Attorneys for Defendant.
503 First National Bank Bldg.,
Macon, Georgia.

EXHIBIT A.

Georgia,
Jeff Davis County.

Before me an officer authorized by law to administer oaths personally appeared the undersigned, who after being duly sworn by me does depose and say:

I understand that this affidavit is to be used in connection with and for the purpose of securing a new trial for the defendant in the case of DeRoy

Floyd, et al. v. Complete Auto Transit, Inc., in the U. S. District Court for the Southern District of Georgia, Brunswick Division.

I have been living in Hazlehurst, Georgia and on State Highway No. 15 for about seven years. I estimate that at least 150 automobile carrying trucks pass through Hazlehurst each day. There are also a large number of freight hauling trucks. I have heard many people in Hazlehurst and Jeff Davis County express their opinions about these trucks, their owners, and drivers. People complain because they say that they congest the highway and city. They say they are afraid of them because they are big and take up a lot of the road. People who live along the highway complain that the trucks make a lot of noise and wake them up at night. My observation is that the truck drivers are better drivers than the average person, but many people in Hazlehurst and Jeff Davis County express a different opinion because they are prejudiced against the drivers and owners of large trucks. A large number of trucks pass through Hazlehurst and therefore people are attracted by their presence. I believe the people in Jeff Davis County and Hazlhurst are unjustly prejudiced against truck drivers and I base this opinion on statements I have heard them make.

(S.) IRA LEE SHUMANS.

Sworn to and subscribed to before me, this 29th day of March, 1956.

(S.) BERTA H. CLEMENTS, N. P.,
Notary Public, Jeff Davis
Co., Ga.

EXHIBIT B.

Georgia,
Jeff Davis County.

Before me an officer authorized by law to administer oaths personally appeared the undersigned who after being duly sworn by me does depose and say:

This affidavit is made for the purpose of using it in connection with a motion for a new trial in the case of DeRoy Floyd, et al. vs. Complete Auto Transit, Inc., in the U. S. District Court, Brunswick, Georgia.

I have been in business since the year 1945 on State Highway No. 15 in Hazlehurst, Georgia. I estimate that between 200 and 250 automobile carriers pass through the middle of the City of Hazlehurst each day. While I believe that the operators properly drive and handle these trucks, many people complain because they cause traffic congestion, they are large, and they make a noise. People say that they are afraid of them because they are large. They also complain that they wake them up at night. One man recently made the remark to me that he wished they would be run away from Hazlehurst and have to use another road. I am of the opinion that there are a large number of people in Hazlehurst and Jeff Davis County who are prejudiced against the drivers and owners of automobile transport trucks.

(S.) W. C. GRINDLE.

Sworn to and subscribed before me, this 29th day of March, 1956.

(S.) BERTA H. CLEMENTS, N.P.,
Notary Public, Jeff Davis
County, Ga.

EXHIBIT C.

Georgia,
Jeff Davis County.

Before me an officer authorized by law to administer oaths personally appeared the undersigned who after being duly sworn by me does depose and say:

I understand that this affidavit is to be used in connection with and for the purpose of securing a new trial for the defendant in the case of DeRoy Floyd, et al. vs. Complete Auto Transit, Inc., in the U. S. District Court for the Southern District of Georgia, Brunswick Division.

I have been conducting a business on State Highway Number 15 in Hazlehurst for the past two years. I have observed that many trucks pass on this highway every day. I estimate that at least 150 automobile transport trucks pass through Hazlehurst each day. There are also a larger number of freight trucks which pass through Hazlehurst. The people in Hazlehurst and Jeff Davis County are very critical of the truck drivers, but in my opinion they are much better drivers than the average person. The people complain because the trucks are large and require a good part of the highway. They say that they make a great deal of noise and keep them awake at night. A lot of people accuse them of traveling at excessive rates of speed, but I usually see the automobiles passing the trucks and traveling much faster. I believe that the main reason why so many people in Hazlehurst and Jeff Davis County are prejudiced against the truck drivers is the fact that the truck

drivers make higher wages than they do. I base this opinion upon statements made to me and in my presence by people of Hazlehurst and Jeff Davis County.

(S.) MRS. JUANITA KNIGHT,

Hazlehurst, Ga.

Sworn to and subscribed to before me this 29th day of March, 1956.

(S.) BERTA H. CLEMENTS, N. P.,
Notary Public, Jeff Davis Co., Ga.

(Copy.)

"EXHIBIT D."

Affidavit.

Deroy Floyd, et al.,
vs.
Complete Auto Transit, Inc.

Georgia,
Toombs County.

Personally appeared before the undersigned authority, Alvin L. Layne, who on oath says that he is one of the attorneys of the defendant in the above-stated case.

Deponent avers that on the panel of jurors from which the jury was struck the following were from Hazlehurst, Georgia: Devoy McClendon, John J. Hammock, Hawley L. Moss, Russell Evans, Clifford Lewis, Quitman Hughes, and William B. Ryals. De-

ponent shows that the defendant used its three (3) strikes in striking John J. Hammock, Clifford Lewis and William B. Ryals, leaving on the jury which tried the case Devoy McClendon, Hawley L. Moss, Russell Evans and Quitman Hughes.

Deponent says that he personally procured the affidavits of Ira Lee Shumans, W. C. Grindle and Mrs. Juanita Knight.

Deponent says that Ira Lee Shumans is a turpentine worker living on Highway #15 within approximately one-half mile of the scene of the accident involved in this case; that Mrs. Juanita Knight operates a cafe on said highway within approximately two (2) miles of the scene of the accident; and that W. C. Grindle is the Chevrolet dealer residing within Hazlehurst, Georgia.

Deponent further shows that the decedent resided within one-half mile of Hazlehurst, Georgia, and deponent believes that decedent's husband and minor plaintiff children still reside in the house where the husband and deceased lived at the time of the accident.

Deponent knows Gordon Knox, Jr., to be a highly respected lawyer who lives in Hazlehurst and that he is the son of a former judge of the Superior Courts of the Brunswick Circuit, who lived also in Haslehurst, Georgia.

According to the 1950 census, Hazelhurst had a population of 2,687 and Jeff Davis County had a population of 9,299.

ALVIN L. LAYNE,
(Alvin L. Layne),

Sworn to and subscribed before me this 2nd. day of April, 1956.

(S.) GRACE TAYLOR,
Notary Public.

EXHIBIT E.

(Title Omitted.)

In person appeared before the undersigned authorities P. S. Ringel, T. Ross Sharpe and Alvin L. Layne, who, first being duly sworn, depose and say that they were counsel for the defendant in the trial of the above-stated case held in the United States Court on March 19 and 20, 1956.

Deponents say that during the concluding argument of J. P. Highsmith, leading counsel for plaintiffs, he repeatedly said to the jury that all the plaintiffs were asking for was a verdict for only $1.47 per day for each of the plaintiffs during the expectancy of the wife and mother. Deponents say that said Highsmith placed a chart on a blackboard before the jury, wrote in large figures "$1.47", multiplied it by 365, then multiplied this sum by 11 (the number of plaintiffs), and then multiplied this by 2856, the expectancy of the decedent, arguing to the jury that he thus demonstrated that the damages far exceeded $165,-

000.00, but that they, in seeking to recover $165,000.00, had reduced the total loss to the present value.

In addition to the aforesaid remarks, the said Highsmith made substantially the following argument to the jury:

"We want you to return a verdict for the full amount of $165,000.00, which is not unreasonable. We want you to stop these trucks from running the farmers off the highway. A verdict in this amount we think will do it."

Immediately P. S. Ringel, one of counsel for the defendant, arose and addressed the Court, saying:

"Your Honor, please, we make a motion for a mistrial because he is arguing for punitive damages and the argument is inflammatory."

Mr. Highsmith then said:
"No, we are not entitled to punitive damages."

Mr. Ringel thereupon stated to the Court:
"We move again for a mistrial on that ground."

His Honor, Frank N. Scarlett, then ruled:
"Well, I overrule you on that ground."

(S.) P. S. RINGEL,
(P. S. Ringel),

As to P. S. Ringel, sworn to and subscribed before me this 2nd day of April, 1956:

ESTHER M. COWEN,
Notary Public, Glynn County, Ga.

(S.) T. ROSS SHARPE,
(T. Ross Sharpe).

(S.) ALVIN L. LAYNE,
(Alvin L. Layne).

As to T. Ross Sharpe and Alvin L. Layne, sworn to and subscribed before me this 31st day of March, 1956:

MARIE V. ANDERSON,
Notary Public, Toombs County, Ga.

The foregoing motion read and ordered filed.

Said motion is set down for a hearing before me at my office P. O. Bldg., Brunswick, Georgia at 11 A.M. o'clock on the 27th day of April, 1956.

It is further ordered that until said motion for new trial is decided, the issuance of an execution or any proceedings to enforce said judgment shall be stayed. Let Plaintiffs' Attorney be served with copy these proceedings as the law provides.

This 3rd day of April, 1956.

F. M. SCARLETT,
United States Judge.

I, P. S. Ringel, do certify that I have served the foregoing motion, notice of hearing and affidavits referred to in said motion upon the plaintiffs by deposit-

ing a copy of said motion, notice and affidavits in the United States mail in an envelope properly stamped and addressed to J. P. Highsmith, Baxley, Georgia, one of the attorneys for the plaintiffs.

This 3rd day of April, 1956.

P. S. RINGEL.

ORDER EXTENDING TIME IN WHICH PLAINTIFFS MAY SERVE OPPOSING AFFIDAVITS.

(Title Omitted.)

For good cause shown the Plaintiffs in the above entitled cause are hereby granted an additional period of twenty (20) days within which to serve opposing affidavits in the Motion for new trial now pending in this matter, pursuant to Rule 59 (c).

This April 18th, 1956.

F. M. SCARLETT,
United States Judge.

Filed April 20, 1956.

(Title Omitted.)

Before me the undersigned, an officer authorized by law to administer oaths, appeared G. H. Wood, who being duly sworn, on oath says:

I am the Deputy Sheriff of Jeff Davis County, Georgia, having occupied that position for the past

eight years. I am in daily contact with residents of Hazelhurst and Jeff Davis County. From conversations with such residents and my knowledge of the people of this county generally, I would say that the people of the County of Jeff Davis and City of Hazelhurst are not biased and prejudiced towards trucks or truck drivers appearing on the highways.

This affidavit is made for the purpose of being used at the hearing of the motion for new trial filed in the above stated case.

(S.) G. H. WOOD.

Sworn to and subscribed before me, this 17th day of April, 1956.

(S.) F. W. KEEN, J.P.,
Notary Public.

Filed this Aug. 6, 1956.

(S.) F. M. SCARLETT,
Judge.

(Title Omitted.)

Before me the undersigned, an officer authorized by law to administer oaths, appeared C. C. Harrison, who being duly sworn, on oath says:

I am the Ordinary of Jeff Davis County, Georgia and in this capacity am in charge of the roads of the county. I have held this office for the past eight years. I come in daily contact with citizens from every portion of the county and every walk of life.

From my contacts with the people of this county I would say that they are not biased or prejudiced against trucks and truck drivers on the highways.

This affidavit is made to be used at the hearing of the Motion for new trial filed in the above stated case.

(S.) C. C. HARRISON.

Sworn to and subscribed before me, this 18th day of April, 1956.

(S.) DOSHIE H. BURFORD,
Notary Public.

Filed this Aug. 6, 1956.

F. M. SCARLETT,
U. S. Judge.

(Title Omitted.)

Before me the undersigned, an officer authorized by law to administer oaths, appeared John Rogers, who being duly sworn, on oath says:

That he is president of the Bank of Hazelhurst, and has been such officer, actively engaged therein, for many years; that he is president of the Rogers Publishing Company, Inc., the only newspaper published in Jeff Davis County, Georgia. That his respective duties are such that he sees and talks to most of the people of the county at some time during the year, and daily talks to a great number of persons.

That the Bank of Hazelhurst is located on South Tallahassee Street, in front of which is the highway

upon which most cars and trucks pass through the city.

Affiant says that he has never heard any citizen make any statements which would indicate prejudice against trucking companies or the drivers of trucks operated on the highways; and that I am of the opinion that there is no such prejudice in the county.

This affidavit is made for the purpose of being used at the hearing of the motion for new trial filed in the above entitled matter.

(S.) JOHN ROGERS.

Sworn to and subscribed before me, this April 17, 1956.

(S.) JEANNETTE BUSH,
Notary Public.

Filed in Office this 6th day of August, 1956.

(S.) F. M. SCARLETT,
Judge.

(Title Omitted.)

Before me, the undersigned, an officer authorzed by law to administer oaths, appeared Eugene Edwards, who being duly sworn, on oath says:

I am the Clerk of the United States District Court for the Southern District of Georgia; that the jury drawn for the March Term, 1956, of the Brunswick Division of the United States District Court of

Georgia, was drawn in the usual manner in open Court. No action taken by me or any other party determined the number of jurors that were drawn from any one county for that term of the Court. In making up the panel of jurors for each case tried at the March Term, 1956, of said Court, the undersigned followed his usual practice and no action of the undersigned or any other party was taken to cause any particular panel of jurors to have on it more residents from one county in the Division than from another.

This is true with respect to the panel of jurors in the above stated case.

This affidavit is made for the purpose of being used at the hearing of the motion for new trial filed in the above stated case.

(S.) EUGENE F. EDWARDS.

Sworn to and subscribed before me, this 18th day of April, 1956.

(S.) JOHN E. CORCORAN,
Notary Public Chatham
County, Ga.

My Commission expires Jan. 12, 1957.

Filed This 6th day of August, 1956.

(S.) F. M. SCARLETT,
Judge.

(Title Omitted.)

In person before the undersigned officer authorized by law to administer oaths, appeared J. H. Highsmith, who being duly sworn, on oath says:

I am of counsel representing the plaintiffs in the above stated case and made the concluding argument in the trial held at the March Term, 1956. In the motion for new trial filed by the defendant I am referred to as "J. P. Highsmith", my correct initials are "J. H."

I did state in the argument that the amount sued for in the case on behalf of the eleven plaintiffs amounted to $1.47 per day apiece for the admitted life expectancy of the deceased wife and mother. It was also stated, in illustrating the value of the services of a mother to a child, that such services continued even after the child was married and had children of her own. One of the plaintiffs in the case is married and has a young child. It was pointed out that the deceased could and would have rendered valuable services to such plaintiff by helping her with such child.

With reference to the argument attributed to affiant in ground 5 of the motion for new trial, reading, "We want you to return a verdict for the full amount of $165,000.00 which is not unreasonable. We want you to stop these trucks from running the farmers off the highway. A verdict in this amount we think will do it". Neither of the last two sentences of the above quotation was made. I did not state "We want to stop these trucks from running the farmers

off the highway. A verdict in this amount we think will do it."

The reference which I made to the use of highways by farmers was:

Apparently defendant from the evidence and argument of its attorneys makes the contention that the plaintiff, Deroy Floyd, should not have been driving the tractor involved on the paved highway but should have taken a back road. Deroy Floyd, a farmer, had just as much right to the use of the highway in driving his tractor thereon as did the defendant trucking company.

It was not at that portion of the argument that an objection was made on the ground that we were asking for punitive damages. Affiant stated in the argument:

That there is an old saying that cheap things are taken cheaply. If you will return a verdict for the full value of the life of the deceased, the amount sued for, perhaps this defendant will not regard human life cheaply.

It was to this portion of the argument that counsel for defendant made the objection that we were asking for punitive damages. The Court stated to the jury that punitive damages were not proper and that any argument contending for punitive damages would be improper and should not be considered by the jury. Affiant stated to the jury that he did not ask for punitive damages but only for the value of the life of the deceased.

This affidavit is made for the purpose of being used at the hearing of the motion for new trial in the above stated case.

(S.) J. H. HIGHSMITH.

Sworn to and subscribed before me, this 19th day of April, 1956.

(S.) MILTON GRAINGER,
(Seal) Notary Public.

Filed this 6th day of August, 1956.

(S.) F. M. SCARLETT,
Judge.

(Title Omitted.)

Before me the undersigned, an officer authorized by law to administer oaths, appeared R. R. Evans, Hawley L. Moss, Quitman Hughes and Devoy McLendon, and each being sworn, on oath says:

I am a resident of Jeff Davis County, Georgia, and have been for many years. I served as a juror on the jury in the above stated case. I have never had, and do not now have any bias or prejudice towards trucks or truck drivers operating on the highways of this county. I myself own and operate a truck. The verdict rendered in the above stated case was based solely on the evidence and not any bias or prejudice on my part. From the evidence it clearly appeared that the driver of the truck was at fault in running into the tractor on which the deceased, Mamie Floyd, was riding. To my mind the amount of the verdict

rendered was reasonable and just under the circumstances of the case.

This affidavit is made for the purpose of being used at the hearing of the motion for new trial filed in the above stated case.

(S.) R. R. EVANS,
(S.) QUITMAN HUGHES,
(S.) DEVOE D. McLENDON,
(S.) HAWLEY L. MOSS.

Sworn to and subscribed before me, this 17th day of April, 1956.

(S.) C. W. WHITE,
(Seal) Notary Public.

Filed this Aug. 6, 1956.

F. M. SCARLETT,
Judge.

JUDGMENT OVERRULING MOTION FOR NEW TRIAL.

(Title Omitted.)

This is an action for the alleged tortious homicide of a wife and mother. The plaintiffs consist of the husband, Deroy Floyd, and ten children of the deceased, Mamie Floyd, the children ranging in age from 4 to 25 years. The defendant is a motor carrier engaged in the delivery of automobiles from assembly plants to various dealers, using an automobile tractor and trailer for that purpose.

The petition of plaintiff alleges: Deroy Floyd and his wife, Mamie Floyd, lived on a farm adjoining and on the southwest side of State Highway No. 15, about 1/2 mile southeast from Hazelhurst, Georgia. On the night of July 27, 1955, these parties decided to make a telephone call. The nearest telephone was at a filling station just within the city limits of the City of Hazelhurst. The Floyds means of transportation was a small Farmall tractor and with this they drove upon the highway, proceeding towards the telephone, the husband driving and the wife standing on the back of the tractor. They had reached a point near the city limits of Hazelhurst when a transportation unit of defendant, approaching from the rear ran into the Farmall tractor. In the collision Mamie Floyd was thrown to the pavement, receiving injuries from which her death resulted. Several acts of negligence, including violations of traffic regulations of the State of Georgia, were charged to defendant, these being in part: Failure to control the speed of defendant's transportation unit so as to avoid running into the Farmall tractor: operating a transportation unit in excess of 50 miles per hour; failing to reduce its speed in approaching and going around a curve in the highway; failing to pass the Farmall tractor being driven in the same direction, a safe distance to the left so as to avoid hitting the tractor, and in failing to keep a proper lookout for other vehicles on the highway.

The defendant alleged that its truck was being operated at a moderate and legal rate of speed, that its driver had just come around a curve in the road and that the Farmall tractor was immediately in front of him in the middle of the righthand lane of

traffic and that said tractor was not equipped with a red tail light as required by the law of the State of Georgia, and Deroy Floyd, as well as the deceased, were charged with being negligent per se in this respect. It was further alleged in the answer that if there was any light burning on the rear of the Farmall tractor it was not red but was white and was hidden by the deceased, who was standing on the drawbar of the tractor.

The defendant also contended that the tractor was being driven by Deroy Floyd so slow as to impede traffic and requested the following charge, which was charged by the Court:

"I charge you that no person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law."

The evidence fully sustained the allegations of plaintiffs' petition. It appeared that the Farmall tractor was being driven on the righthand side of the highway leaving ample passing room on the left. While defendant's driver denied there was a light on the rear of the tractor, several eye-witnesses testified that there was a plainly visible light on the rear. Plaintiffs admitted that this light did not have a red-reflector. Defendant's driver testified that in coming around the curve his lights were thrown to the right of the highway and he could not see the Farmall tractor until he was within about 30 feet of it. It was not disputed that the curve was only a 3-degree curve. The Sheriff of the county in which the accident

occurred testified he made a test on this highway at night, at the same place, under similar circumstances, and a tractor with a similar light could be seen for at least 60 feet. The State Highway Patrolman who investigated the accident testified that he was familiar with the highway at this place and approached vehicles at night, with and without lights, and they could be seen 500 to 600 feet ahead. He further stated that he could find no reason why the tractor even without light could not have been seen within ample time to avoid running into it.

The Motion filed by defendant is on the general grounds, and in addition, the following grounds: (1) Amount of verdict manifests bias, prejudice and passion by the jury: (2) prejudice of jurors from Jeff Davis County, the county in which the collision occurred, and (3) improper argument of attorneys for plaintiffs.

As to the general grounds, the allegations of the petition were amply supported by the evidence as above stated.

With reference to the amount of the verdict, the laws of th State of Georgia provide in case of homicide of a wife and mother the surviving husband and children may recover for the full value of the life of the deceased.

Georgia Code Section 105-1306:

"Homicide of wife or mother—The husband may recover for the homicide of his wife, and if she leaves child or children surviving, the husband and children shall sue jointly and not separately, with the

right to recover the full value of the life of the decedent, as shown by the evidence, and with the right of survivorship as to said suit, if either shall die pending the action."

Georgia Code Section 105-1308:

"Full value of life of decedent, as shown by the evidence defined.—The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived."

As applied to a wife and mother, appellate Courts of Georgia have stated: "She sustains to her husband and his household a relation special and peculiar. Her place cannot be supplied. No other is capable of filling it. The actual facts and circumstances of each shall guide the jury in estimating for themselves in the light of their own observation and experiences and to the satisfaction of their own consciences, the amount which would fairly and justly compensate for the loss".

Metropolitan Street R. R. Co. vs. Johnson 91 Ga/466(3) at bottom page 471;

Standard Oil Company v. Reagan, 15 Ga. App 572 (9).

Blue's Truck Line, Inc., v. Harwell, 57 Ga. App/139(7).

Under the evidence the deceased had a life expectancy of 28.27 years and rendered most valuable

ervice to her husband and ten children. The amount f the verdict does not evidence bias and prejudice on he part of the jury, and in the opinion of the Court s reasonable.

In its motion, defendant, by the affidavit of three persons, seeks to establish prejudice on the part of the jurors from Jeff Davis County, Georgia. These facts are disputed by the affidavit of not only several citizens of the county, but by the affidavit of the jurors themselves. If prejudice towards truck drivers existed generally among the citizens of Jeff Davis County, then certainly defendant and its attorneys had ample time to discover such condition (so quickly unearthed after the verdict) prior to the trial and make a proper challenge to the array of jurors at the trial. Defendant does not contend it made any effort to discover any prejudice of the jurors prior to the trial, nor of exercising its right to question jurors on this ground at the trial. No merit appears in this ground of the motion.

Defendant seems to indicate an undue number of jurors were on the panel from Jeff Davis County. An affidavit of the Clerk of Court shows the jurors to have been drawn and panels made up in the regular and proper manner. There is no evidence or knowledge of the Court to the contrary.

The final ground is based on alleged improper argument of J. H. Highsmith, attorney for plaintiffs. It appeared from the evidence that two of the plaintiffs had small children of their own. Mr. Highsmith stated in his argument that a mother continued her services to a child by helping such child with her

children. On objection by attorney for defendant the Court directed that such argument be omitted. It is a matter of common experience that a mother does render service to a child by helping with the children of such child. If error was committed by the Court in directing that such argument be omitted, it might well be error in favor of the defendant. Certainly it was not grounds for a mistrial.

Defendant next contends that Mr. Highsmith as attorney for plaintiffs made the statement in his argument "We want to stop these trucks from running the farmers off the highway and a verdict of the full amount of $165,000.00 we think will do it". The burden is one (sic) the movant to establish the facts claimed in its motion. The Court reporter was available but defendant did not request the argument of attorneys reported. In the record it appears that Mr. Ringel, of attorneys for defendant, made an objection to argument of Mr. Highsmith, of attorneys for plaintiffs, on ground that he was arguing punitive damages. The Court asked what argument was referred to. Mr. Ringel replied that Mr. Highsmith in substance had stated: "We want you to stop these trucks from running the farmers off the highway, and that a verdict for the full amount of $165,000.00 we think will do it." This was then denied by Mr. Highsmith. The Court directed the jury that such issue was not in the case and for them to disabuse their minds of it. To establish the statement attributed to Mr. Highsmith, defendant submits the affidavit of its attorneys, P. S. Ringel, T. Ross Sharpe, and Alvin L. Layne, which states that such was "substantially" his argument. To the contrary Mr. Highsmith makes and submits an affidavit specifically denying the

statement attributed to him and stating what he said. All the attorneys are reputable parties. It is impossible for the Court to have a recollection of statements made in arguments to the jury. After taking into consideration the affidavits submitted on the question of this statement alleged to have been made by Mr. Highsmith in his argument, the motion on this ground is denied.

It appearing that the verdict rendered in the case is reasonable and just, the motion for new trial is overruled on all grounds.

So Ordered, this 16th day of August, 1956.

F. M. SCARLETT,
Judge, U. S. District Court.

Filed in Office August 17, 1956.

Filed Sept. 10, 1956.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

Deroy Floyd, et al., Plaintiffs,
v. Civil Action No. 416.
Complete Auto Transit, Inc., Defendant.

Notice is hereby given that Complete Auto Transit, Inc., the defendant in the above-stated case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the judgment entered in this action on March 26, 1956, in favor of the plaintiffs, the

running of the time for appeal having been terminated by a timely motion for new trial, an order denying said motion for new trial having been entered on the 16th day of August, 1956.

This 10th day of September, 1956.

(S.) CUBBEDGE SNOW,
(Cubbedge Snow),
Attorney for Complete Auto Transit, Inc.

Of Counsel:
MARTIN, SNOW & GRANT,
503 First National Bank Building,
Macon, Georgia.
RINGEL & RINGEL,
Brunswick, Georgia.
T. ROSS SHARPE,
Lyons, Georgia.
ALVIN L. LAYNE,
Lyons, Georgia.

I certify that I have this day mailed a copy of the foregoing notice of appeal to Mr. J. H. Highsmith, Baxley, Georgia, one of the attorneys for the plaintiff.

This 10th day of September, 1956.

EUGENE F. EDWARDS,
Clerk,
By MARY R. CROSS,
(Mary R. Cross),
Deputy Clerk.

Filed Sept. 10, 1956.

(Title Omitted.)

Comes now the appellant in the above case and moves that the original exhibits submitted by both parties be transmitted to the United States Circuit Court of Appeals for the Fifth Circuit.

This 10th day of September, 1956.
(S.) P. S. RINGEL,
(P. S. Ringel),
Attorney for Appellant.

On motion of P. S. Ringel, attorney for appellant, it is ordered that the Clerk of this Court transmit to the Clerk of the Court of Appeals in New Orleans the original exhibits introduced by both parties in this action, to be by him safely kept and returned to this Court upon the final determination of said cause.

This 20th day of September, 1956.
(S.) F. M. SCARLETT,
United States Judge.

I have this day served a copy of the foregoing motion and order upon the appellees by mailing said copy to J. H. Highsmith, Baxley, Georgia, one of the attorneys for appellees.

This 10th day of September, 1956.
(S.) P. S. RINGEL,
(P. S. Ringel).

Filed Sept. 10, 1956.

(Title Omitted.)

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, appellant designates the following portions of the record to be contained in the record on appeal:

(1) Complaint without process or entry of service.

(2) Answer of defendant.

(3) Reporter's transcript of the evidence and proceedings adduced in the trial with the exception of argument of counsel, which was not reported.

(4) Charge of the Court.

(5) Verdict of the jury and judgment thereon.

(6) Motion for new trial and affidavits (Exhibits A-E) attached thereto, with date of service and filing.

(7) Order, dated April 18, 1956, extending time within which plaintiffs could serve opposing affidavits.

(8) Affidavits of G. H. Wood, C. C. Harrison, John Rogers, J. H. Highsmith, Eugene Edwards and R. R. Evans, Hawley L. Moss, Quitman Hughes and Devoy McLendon, served by plaintiffs upon the defendant with respect to motion for new trial.

(9) Order denying motion for new trial.

(10) Notice of appeal with date of filing.

(11) This designation.

(12) Order transmitting original exhibits to Circuit Court of Appeals.

This 10th day of September, 1956.

(S.) CUBBEDGE SNOW,
(Cubbedge Snow),
Attorney for Appellant.

Of Counsel:
MARTIN, SNOW & GRANT,
503 First National Bank Building,
Macon, Georgia.
RINGEL & RINGEL,
Brunswick, Georgia.
T. ROSS SHARPE,
Lyons, Georgia.
ALVIN L. LAYNE,
Lyons, Georgia.

I, P. S. Ringel, of counsel for the appellant, do certify that I have served a copy of the foregoing designation of record upon the appellees by mailing said copy to J. H. Highsmith, Baxley, Georgia, one of the attorneys for the appellees.

This 10th day of September, 1956.

(S.) P. S. RINGEL,
(P. S. Ringel).

Filed Oct. 12, 1956.

(Title Omitted.)

It having been made to appear to the Court that for providential reasons the clerk will be unable to file the record on appeal in this case within 40 days from the date of filing the notice of appeal;

Whereupon, It Is Ordered that the time for filing the record on appeal and docketing the appeal be extended to December 8, 1956.

This 12th day of October, 1956.

(S.) F. M. SCARLETT,
United States Judge.

A TRANSCRIPT OF THE PROCEEDINGS.

(Title Omitted.)

Filed Aug. 6, 1956.

Appearances.

For the Plaintiffs: Highsmith & Highsmith, attorneys at law, Brunswick, Georgia, and Gordon Knox, Attorney at law, Hazlehurst, Georgia.

For the Defendants: Sharpe & Layne, Attorneys at Lyons, Georgia, and P. S. Ringel, Attorney at law, Brunswick, Georgia.

Opening Statement on Behalf of the Plaintiffs.

By Mr. Highsmith:

May it please the Court and you gentlemen of the jury:

This is an action on behalf of Deroy Floyd and his ten children against Complete Auto Transit Company for the death of the wife and mother, which was caused last July 27, 1955, when a transportation unit of the Complete Auto Transit Company ran into the back of a Farmall tractor, which Deroy Floyd was driving, and on the back of which his wife was riding.

Deroy and Mamie Floyd were married some 26 or 7 years ago. During the years of their marriage there was borne to them 10 children, the oldest of which, at the time of this accident, was approximately 25 years of age, and the youngest of which, at the time of the accident, was approximately four years of age.

Deroy is what is known as a tenant farmer. As time went on and the price of groceries went up and there were more mouths to feed in that family he found that during that time, doing his work, he was not able to furnish enough for the family, and about six years prior to his wife's death the mother, Mammie Floyd, went to work at a slip factory in Hazlehurst. In addition to her duties as a wife and mother, after getting up in the morning, in the early hours, and getting breakfast and getting the kids off to school, she went to work at eight o'clock at the slip factory in Hazlehurst, where she worked from eight o'clock until four o'clock in the afternoon, earning there, I believe, at the time of her death the sum of $30.00 a week. She then came home and prepared supper and got the kids to bed and helped with the farm work and did other things that a farm wife and mother do.

On this date of July 27th, 1955, she had a brother that was operated on in the hospital at Dublin, Georgia. They were then living about a mile and a half southeast from Hazlehurst, adjoining what is known as State Route 15, and U. S. Highway No. 23, as I recall it, and on the west side of that road. That is just outside of the city limits of Hazlehurst, and in that area there are quite a few houses within a short stretch of the road. She was worried about her brother the condition he was in, having been operated on that day. Sometime about 9:15 in the night she asked her husband, Deroy Floyd--they had no telephone at their house—and she wanted to telephone the hospital in Dublin, and she asked her husband to take her up to what is known as Davis' Filling Station just inside the city limits of the city of Hazlehurst, that being the nearest 'phone. Deroy Floyd owned no automobile. His son that lived there did have a car, but his son was away. The man he worked for, and the tractor that he used, a Farmall super-tractor, a 1950 model, was at the house. It had lights on the front and a light on the back. At that time it was put out prior to the law requiring a red glass, so it had a white glass in the tractor's back light. They drove out of a drive way, and that was the only means of transportation that they had at that particular time. They drove out of the drive way at the Floyd Residence and on to the highway and on to the right-hand side of the highway. Sitting on their porch, just south of the Floyd house, were Mr. and Mrs. Tom Fair. They saw the Floyds drive out of the drive way and saw the lights of the tractor on the front and back. They saw them proceed on down toward Hazlehurst, going north on the highway, and going on the right-hand side of the highway, and they

proceeded on out of their sight. Not long after the Floyds had gone out of their sight Mr. and Mrs. Tom Fair heard a tractor coming. They heard the noise and saw it pass and then in a minute or seconds later they heard a crash, or the tractor hit what they later found out to be the Floyd tractor that was being driven toward Hazlehurst. As the tractor proceeded on down the highway and toward Hazlehurst and the 'phone they had reached a point in front of the home of Mrs. Beck, which is approximately 800 feet from the drive way that they turned in, and about the time they reached the home of Mrs. Beck Mrs. Floyd, Mammie Floyd, exclaimed to her husband "there comes a big truck", and the next thing he knew he was lying in the ditch, with his tractor broken into, lying behind him. He got up and hollowed for help, and saw his wife lying in the road and went to help her up. On the porch of the house just across the way from where the collision occurred were Mrs. Shuman and Mrs. Carter. They saw the tractor coming down the road with the lights and saw the big transportation unit, a carrier of automobiles, coming back of it and saw it run into this farm tractor.

At the time the truck, as I will use that term to distinguish it from the farm tractor, at the time that the truck ran into the tractor the farm tractor was on the right-hand side of the highway and had one wheel off the paved portion of the highway and was on the dirt. The tractor came from behind it at a rapid rate of speed. The driver of the truck could see, if he was looking, for at least 500 or probably 600 feet ahead of him. There was no obstruction of the view ahead of him. He had ample room to turn to the left and pass the tractor safely. He could have

avoided it very easily, but for some reason he waited until the last minute to pull his tractor around, or pull his truck around, and the saddle tank of the truck hit the left wheel of the tractor and threw it off and caused Mrs. Floyd to fall in the highway on her head.

For a couple of days she remained in the hospital at Hazlehurst. She didn't show any signs of being unconscious for maybe a day and a half. She complained of some peculiar feeling in her arm. On the second day Dr. Goldman, at whose hospital she was, realized that arm and leg was getting numb. She lost consciousness. He realized that she was suffering from a hemorrhage, and he sent her to Augusta, and she was operated on about the third day afterwards and died on August 2nd.

Gentlemen, this involves an action for her death, by reason of the negligence of the driver of the defendant, the Complete Auto Transit Company. In a case like this, the defendant is liable for the full of life of the deceased where the negligence of the defendant was the cause of the death of the deceased. In this case we think it some what unusual from the ordinary damage suit. We are suing in this case for a $165,000.00. In the ordinary damage case maybe sometime they sue for more than the real value, or for more than they expect to get. We expect, Gentlemen, from the evidence that you will find that we haven't sued for one penny more than these plaintiffs are entitled to, and we expect to show you that by the evidence, if you will listen to it carefully. Thank you.

Opening Statement on Behalf of the Defendant.

By Mr. Sharpe:

May it please the Court and you gentlemen of the jury:

I am Ross Sharpe from Lyons, Georgia, and together with Judge Ringel and Mr. Layne we represent the Complete Auto Transit Company.

I shall make the defendant's opening statement very brief, because after all it is the testimony that we expect to submit to you that counts. I can't testify in the case and will not undertake to testify.

The plaintiff here has a diagram. We have a diagram, and we expect to show you, gentlemen, by competent testimony, and not by theory, or imagination or conjecture that this truck, driven by Mr. Edwards, came around this curve on this road on a dark night, that this gentlemen, Mr. Floyd, was operating a very small farmall tractor, and I hope some of you gentlemen on this jury know something about operating a farmall tractor, that there was no red light on the back of the tractor, as Mr. Highsmith has stated. In fact, there was no light of any kind on the back of the tractor. We expect to show you further by competent testimony that it is a physical impossibility for this kind of a tractor, with a lady standing on the back of it, and with the driver sitting in the seat, which was in the middle, for anyone to see even the front light, which was only 21 inches from the ground.

We expect to show you that this truck of the Complete Auto Transit Company was not in violation of the state law, that we were within the load limit, that we were within the speed limit, that we were

on our proper side of the road, and if there was any negligence we say that it was brought about by Mr. Floyd driving this tractor, and there was no violation charged either to Mr. Floyd or to our driver. The case was investigated by the State Patrol. We have the Patrolmen here. And furthermore I heard Mr. Highsmith say that they expected to show that the tractor driven by Mr. Floyd was off on the right-hand shoulder of the highway.

We expect to show by the driver of this truck and by the Georgia State Patrol, who investigated this wreck, that both wheels of the tractor were on the highway, with no warning light in the back, and if there was a light on the front of it, with his wife standing there, and the light, if any, on the front, was only 18 inches from the pavement. These tractors are very very narrow. We have pictures of it. That if there was a light there on the front it was obscured and it was humanly impossible to see it and avoid it. Furthermore, you will notice from this diagram here that both of them were driving toward Hazelhurst. You gentlemen who drive cars and tractors know that in this direction, when you are coming around a curve, (indicating on diagram), your lights reflect off the highway, that immediately after our driver discovered that something was ahead of him, not being able to tell what it was, that he cut his truck as far to the left as it was possible, that when his saddle tank on the rear of it struck the left-hand wheel of the tractor, driven by Mr. Floyd, for some unknown reason the steering wheel and the control of his truck was completely lost, that is, the steering wheel on his truck which controls the driving of the truck, was completely lost. He had no brakes, no steering apparatus, no control over the truck and

tractor, that in spite of that, without being able to apply any brakes, and after striking the farmall truck driven by Mr. Floyd, that even with that the truck only travelled a 159 feet and stopped about 50 or 70 feet in front of this home here, which I believe was the Beck residence.

Now, of course, it is a very unfortunate thing for anyone to loose their life regardless of the circumstances, but if the driver of this truck was helpless and it was impossible for him to avoid it, and if Mr. Floyd, with his wife on there, knowing that this was a heavily travelled highway, brought about his wife's death, then we don't think the Complete Auto Transit Company should have to pay $165,000.00, or any amount.

Now, the only testimony that we expect to offer you is by disinterested parties. The only witnesses that we are going to put on this stand that might have any interest in the outcome of this case would be the driver of the truck, which was a necessary party to it, because he knows more about it than anybody else, but every other witness that we shall put up will have no interest whatever in the case. We ask you to observe the witnesses on both sides and observe the interest or the want of interest they have in the outcome of the case, and if we show you these things then we will ask a verdict in favor of the defendant.

Mr. Highsmith:

If Your Honor please, the following are admissions of the defendant in the pleadings, and we ask that the defendant's counsel listen and if there is any question about it, why, we will get it straight.

It is admitted that the plaintiff is a resident of the State of Georgia, and that the defendant is a non-resident Corporation, being incorporated in the State of Mississippi.

Second, that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

Three, the defendant is a motor carrier engaged in interstate and intra-state transportation, holding a certificate issued by the Public Service Commission of the State of Georgia.

Four, the defendant on July 27th, 1955, was the owner of a 1954 Chevrolet tractor and trailer, not less than 44 feet in length and 8 feet in width, which at about 9:30 P.M., was being operated on State Highway No. 15, leading from Alma to Hazlehurst, Georgia. This tractor was at the time being driven toward Hazlehurst by a duly authorized employee of the defendant and had reached the point about one-half mile southeast of Hazlehurst when it had a collision with a farmall tractor being driven by Deroy Floyd.

Five, at all times, alleged in the petition, Robert G. Edwards was the authorized driver of said vehicle of the defendant and an employee of the defendant acting in the course of his employment.

The Court:

What is that you reading, Mr. Highsmith? What is the purpose of it?

Mr. Highsmith:
We have to put it in evidence, Your Honor. It is admitted in the pleadings, and I am just reading them into the record as admissions.

The Court:
All right.

Mr. Highsmith:
Sixth, that at the time of her death Mammie Floyd had a life expectancy of 28.7 years. Those are admissions.

The Court:
In other words, those are your contentions and the defendant has admitted them?

Mr. Highsmith:
Yes, sir.

E. L. HATTON, Sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Highsmith:
Q. You are E. L. Hatton?
A. Yes, sir.
Q. What position, if any, do you occupy in Jeff Davis County?
A. Sheriff of the County.
Q. Are you familiar with State Highway No. 15, which is also U. S. Highway No. 23, that leads from Alma, Georgia to Hazlehurst, Georgia?
A. Yes, sir.

Q. Do you patrol that road frequently?

A. Some, and my deputies.

Q. Have there been any changes in that road, any houses adjoining the road, and the terrain of the road, that portion of the road that commences just northwest of what is known as Pair house, where Tom Pair formerly lived, to beyond the Willie Shuman house? Have there been any changes there?

A. None that I know of.

Q. None since July 27th down to the present time?

A. No, sir, not as I know of. There could have been a house built on the left, coming into town, but I am not too sure about that.

Q. As far as the road is concerned, it is the same?

A. Yes, sir.

Q. Mr. Hatton, did you recently have an occasion to ride out on that road and make a test as to how far a tractor could be seen at night?

Mr. Sharpe:

Now, if the Court please, we submit that is an improper question, because he first would have to identify the identical tractor and make and this tractor. It would be entirely possible for another tractor of the same make to have different kind of lights. That would be a conclusion of the witness.

Mr. Highsmith:

I will connect it up, Your Honor.

Q. About when was that, Sheriff Hatton?

A. What was that, sir?

Q. Did you have an occasion to ride out on this road some several weeks ago or some several days

ago, and make a test as to how far a tractor could be seen?

A. I would say several days ago.

Q. All right, sir. Sheriff, would you mind looking at this drawing here? Assuming that this is the residence of Tom Pair, where Tom Pair lived, coming from Alma, and this is the residence known as the Floyd residence, going on northward, and this is the Beck residence and this is the Willie Shuman residence?

A. Now, what is it you want me to say?

Q. Well, does that represent that road, as you know it?

A. Yes, sir.

Q. Where did you start in the automobile to make the test? Where did you start to see what portion of the road you could see the tractor on?

A. Along about this drive way here.

Q. Did you start back southward of the drive way in your car?

A. Yes, sir.

Q. Was there a 1950 Farmall tractor parked on the right-hand side of the road just beyond the Beck residence?

A. There was.

Mr. Sharpe:

Now, if the Court please, as counsel knows we have another tractor, not this tractor in question.

The Court:

He said it was the same model. If he connects it up, all right.

Mr. Highsmith:
Yes, sir, I will connect it up.

Mr. Sharpe:
Well, we object to it unless he shows that it was identical like this tractor, that the lights were exactly like it, both front and rear, we submit that even though it would be ruled out it would still injure the defendant's right.

The Court:
Well, it would be a question of fact for the jury when they get through whether or not that was a similar tractor. You may proceed, but you will have to connect it up, Mr. Highsmith.

Mr. Highsmith:
I will connect it up.

Q. You can step right back here, Sheriff. Mr. Hatton, was there a right-of-way marker just beyond the drive way of the Beck residence, a concrete right-of-way marker?

A. I don't remember.

Q. Were you out there at the scene of this accident that night after it occurred?

A. I was out there after it happened, yes.

Q. Was there a place that night, on this road, just beyond the Beck residence, where a sign had been made by oil spilling from the tractor that was hit?

A. Yes, sir.

Q. The night that you make the test, was the test tractor placed in the same place that that oil was, on the right-hand side of that road?

A. Yes, sir, it was, the sign was still there.

Q. The sign was still there?

A. Yes, sir.

Q. And proceeding from the southeast, going northwest toward Hazlehurst on this, what were you riding in?

A. An automobile.

Q. Did it have just regular standard lights on the automobile?

A. Yes, sir.

Q. Going toward the tractor, at what place on the road could you first see the tractor parked beyond the Beck residence?

A. This Floyd residence?

Q. Yes, the Floyd residence?

A. Back here.

Mr. Sharpe:

If Your Honor please, I hate to test the patience of the Court.

The Court:

That's all right. You go right ahead.

Mr. Sharpe:

Here is the point: The petition itself alleges that there was a certain kind of tractor being driven by Mr. Floyd, that his wife was standing there behind him on this tractor. Now, here is an entirely different set of facts altogether. They are asking Mr. Hatton to draw conclusions without his wife being back there.

The Court:

Well, the cars could be in the same position whether the wife was there or not, couldn't they?

Mr. Sharpe:

No, sir. The lights on it were not the same with her standing there as they would be without her standing there, and that is one of the defenses. She obscured the rear light and—

The Court:

Well, that is a question of fact for the jury. You will have the witness on cross examination. After all, it is a question of fact for the jury.

Q. Sheriff, state whether or not from the point of the Floyd residence here down to where the tractor was parked you could see it without any obstruction of your view?

A. Yes, sir.

Q. Do you know approximately the distance that is, Sheriff?

A. Around 600 feet, I believe.

Mr. Sharpe:

If the Court please, we move to exclude all the testimony of this witness on several grounds. First, the proper foundation has not been laid.

The Court:

Why not?

Mr. Sharpe:

Because the petition alleges that our tractor was moving and the other tractor was moving. There is not testimony here that this tractor was standing still.

The Court:

Well, it is a question of visibility, isn't it? The sheriff has testified that the conditions were the same then as it is now, or is the same as it was when he went out there a few days ago, and he testified as to where he could see the tractor. I think that was the substance of Mr. Highsmith's question and the witness' answers. I will admit it. I will overrule your objection.

Mr. Sharpe:

Will Your Honor permit me to read a very short decision?

The Court:

Well, I have had this question up about every week for the last ten days, but you go ahead.

Mr. Sharpe:

We say they haven't laid the proper foundation. They alleged that our tractor was moving. In this case here the tractor was standing still. In the petition they allege that our truck was moving and that their tractor was moving, but in this case here the tractor was standing still. They allege that our truck was travelling in excess of 50 miles an hour. He was travelling in a car but he doesn't say what the speed was. The petition in this case alleges that the tractor was off the road, but in this so-called test the tractor was standing still on the road, and he was driving an automobile and our man was driving a truck.

The Court:

What difference would it make in visibility? Wouldn't it be the same in an automobile as in a truck?

Mr. Sharpe:
There is quite a difference.

The Court:
Mr. Sharpe do you mean to say that the visibility would be different riding in a truck than in riding in an automobile?

Mr. Sharpe:
Yes, sir, because an automobile light is 20½ inches off the ground and a truck light is 45 inches off the ground.

The Court:
Well, I think all of that is a question of fact for the jury to determine. If your witnesses can show to the contrary that is all a question of fact for the jury to determine. I overrule your objection.

Mr. Sharpe:
Well, there is a decision of in the 92nd Appeals, decided last May 24th, the case of Colbey vs. Russell, which was a case from Gainesville, Georgia, where the facts were very similar, and in that case they permitted a sheriff, who was not present at the time of the accident, to state facts similar to what Mr. Hatton has stated.

The Court:
Is that a newspaper report?

Mr. Sharpe:
No, sir, that's the Supreme Court Report.

The Court:
Let me see it. I will overrule the objection.

Mr. Highsmith:
The witness is with you.

Cross Examination.

By Mr. Sharpe:
Q. Mr. Hatton, that road has quite a bit of traffic on it, doesn't it?
A. Yes, sir, at times it is heavy, and then again it is not.
Q. It is travelled more than the ordinary highway, isn't it, not as much as U. S. No. 1, or U. S. 301 or No. 17?
A. I would imagine that particular highway is traveled as much as any highway in our county.
Q. The surface of the road is dark, isn't it?
A. Yes, sir.
Q. Black, you might say?
A. A dark color, yes, sir.
Q. In the test you speak of, this truck was standing still?
A. I beg your pardon, sir.
Q. The test you speak of making, the tractor was standing still?
A. Yes, sir.
Q. In what position? Was it in the road or on the edge of the road? What position was it in?
A. The tractor was pointed back toward town.
Q. What time of the night was it?
A. Well, I would say it was between eight and nine o'clock, something along there.
Q. What kind of lights were burning on the back of it?
A. Just one light.
Q. What color was it?

A. Well, it was more or less a reddish color.

Q. There was no lady standing on the back of it?

A. No, sir, it was about like an automobile light.

Q. But there was no lady standing on the back of the truck, or tractor?

A. No, sir.

Q. There was no one sitting in the seat of the tractor?

A. No, I wouldn't know about that. I wouldn't be able to testify about that.

Q. But you know that there was no lady standing on the back of it?

A. No, sir, I didn't see one.

Q. All right. Were you asked to go out there to make this particular test?

A. I was asked to go out there.

Q. The purpose of your visit out there was to make a test for the plaintiffs' counsel? You were requested by some one?

A. Yes, sir.

Q. Therefore you were necessarily and anticipating and looking for a tractor on the road, wasn't you?

A. That, I was.

Q. Had some one been sitting on the tractor, and had there been no red light on the back of it, and had a lady been standing there with skirts wide enough to obscure whatever light there was and you were coming around that curve at 50 miles per hour without anticipating this tractor would be on the road in that physical condition your view and opinion could have been different, would it not?

A. Yes sir, the view would have been different.

Re-Direct Examination.

By Mr. Highsmith:

Q. Mr. Hatton, would you refresh your recollection as to whether that was a white light, a white glass, or a red glass or light, on the back there?

A. Well, the best I remember it was just a light.

Q. Do you have any distinct recollection about the color of it?

A. Well, I wouldn't want to swear to it. I just remember that it was a small light, about that large, something like that. I mean I wouldn't want to testify as to the color of it.

Q. Who was on the tractor and drove it up to that spot?

A. Mr. Floyd.

Q. You don't know where the tractor came from?

A. I do not.

Mr. Highsmith:

That's all.

Mr. Sharpe:

If the Court please, I renew my objection and my motion.

The Court:

I have already overruled it. He was testifying as to facts, as I understood him. He was not testifying as to an opinion. He testified to facts as existed last week and as existed at the time of the accident. I overrule the objection.

Mr. Sharpe:

All right, sir. I withdraw the objection on account of the testimony about the difference in the color of the lights.

The Court:
All right, you can go down. Call your next witness.

(Witness withdrawn.)

MR. A. J. HARRINGTON, sworn for the Plaintiffs, testified.

Direct Examination.

By Mr. Highsmith:
Q. You are Mr. A. J. Harrington?
A. Yes.
Q. Mr. Harrington, you are a graduate of a college?
A. Georgia Tech in Atlanta, Georgia.
Q. What was the course you studied?
A. Civil Engineer.

Mr. Sharpe:
I will admit his qualifications.

The Court:
All right, his qualifications are admitted.

Q. Are you now engaged in making surveys and models?
A. Yes, sir.
Q. Did you have occasion recently to make a survey of U. S. Highway No. 23, also known as State Highway No. 15, that commences just southeast of what is known as the Tom Pair residence and proceeds on northwestward until it passes the Willie Shuman residence?

A. That's right.

Q. Did you make that survey?

A. Yes, sir.

Q. What were you determining in that survey, Mr. Harrington?

A. Just the outlay of the road and all of the adjacent buildings and so forth.

Q. Did you determine the degree of the curve of the road?

A. Yes, sir.

Q. Did you draw the road to scale?

A. I did, sir.

Q. Did you draw the distances of the residences to the road to scale?

A. Yes, sir.

Q. Did you draw the drive way to the road from the residence?

A. Yes, sir.

Q. I exhibit to you a drawing, described as a map, showing a portion of U. S. Highway No. 23, east of Hazlehurst, Georgia, in Jeff Davis County, Georgia, dated March 2nd, 1956, signed Harrington Engineering Company. Did you prepare that map from that survey?

A. Yes, sir, I did.

Q. Is that the correct representation of the road and terrain and those things that appear on the map?

A. Yes, sir.

Q. Did you make a test looking from the southeast to northwest to see how far you could see down that road to what distances eliminated your view?

A. Yes, sir; I did.

Q. Did you look to determine at what point, coming from the southeast, you could see the right-hand side of the highway in front of the Beck residence?

A. Yes, sir, I did.

Q. Just beyond the Beck residence?

A. Yes, sir.

Q. You can refresh your memory from your survey, if you want to, Mr. Harrington, but at what distance did you have an unobstructed view?

A. 680 feet.

Q. 680 feet?

A. Yes, sir.

Q. At that distance was there anything on the highway that obstructed your vision of the points beyond the drive way of the Beck residence?

A. No, there were not.

Q. At what distance could you see from the Beck residence could you see the railroad track in Hazlehurst?

A. Please state that again.

Q. At what distance on the highway southeast of the Beck residence, where you have marked "scene of accident", could you see the railroad tracks in Hazlehurst?

A. 400 feet.

Q. 400 feet southeast of the scene of the accident?

A. Yes, sir.

Q. And at what distance could you see the traffic light?

A. 320 feet.

Q. You have a red cross marked on your plat, what does that designate?

A. That is the point of the accident as pointed out to me.

Mr. Sharpe:

Your Honor, this gentlemen wasn't there at the time of the accident.

Mr. Highsmith:
I will locate the point on the highway. I will connect it up.

The Court:
Yes, you will have to do that.

Q. How far from that point that you have marked "scene of accident", how far is it northwest from the drive way of the Beck residence?
A. I don't have the exact distance, sir, but I can get the scale and approximate it.

The Court:
I want the record to show that the remark I made just now to Mr. Sharpe about the newspaper, was because he was reading from a sheet, which was taken from the Reports, looked like from here was a newspaper account. I am glad to rectify that statement, because it was taken from a decision of the Court and was not a newspaper account.

Q. What distance is that point that you have there southeast from the northwest edge of the Beck residence? Well, I will put it this way: What distance from the northwest edge, from what you have designated as the drive way, to the Beck residence, that you have the scene of the accident happening?
A. Approximately 12 feet.
Q. Approximately 12 feet?
A. Yes, sir, that is from the edge of the drive.
Q. You have designated on your map a point called "Pair residence", how far is that from the drive way of the Floyd residence?

A. From center to center it would be around 210 feet.

Q. How far is it from what you have designated as the scene of the accident to the Shuman residence?

A. 190 feet.

Q. How far is it from the Floyd residence to what you have designated as the scene of the accident?

A. 840 feet.

Q. Did you make a test to see how far from the southeast you had an unobstructed view of the highway in front of the Floyd residence?

Mr. Sharpe:

Now, may it please the Court, this survey was made in the daytime under different circumstances and not under the conditions that existed at the time of the accident.

The Court:

Well, wouldn't the measurements be the same in the daytime as at night?

Mr. Sharpe:

Not as to how far he could see.

The Court:

Well, you will have to connect that up, Mr. Highsmith.

Mr. Highsmith:

Your Honor, it is just a question of whether the curve would present an obstruction or not.

Q. The highway was straight enough to see how far at that point, Mr. Harrington?

A. At least 1500 feet.

Q. At least 1500 feet?

A. Yes, sir.

Q. Mr. Harrington, I exhibit to you a model of a section, which purports to be a model of a section of a highway. Did you prepare that model?

A. Yes, I did.

Q. Did you also prepare the farmall tractor with the figures there on it?

A. Yes, sir.

Q. Did you prepare the transportation unit, back of that, an automobile carrier, as it is sometimes designated?

A. I did the painting on it, yes, sir.

Q. Did you measure the scale of the road that you have prepared there?

A. Yes, sir.

Q. Is it drawn to scale?

A. Yes, sir.

Q. What is the scale you have there?

A. The scale is approximately one inch equals two feet.

Q. Did you use that same scale in connection with the automobile carrier-all?

A. Yes, sir.

Q. And did you use the same scale in connection with the tractor?

A. Yes, sir.

Q. On that scale, what width have you shown on the highway?

A. The width of the highway, sir?

Q. At that place?

A. I have shown 21 feet. It varies a few tenths one way or the other.

Q. Did you measure it at that place?

A. Not exactly at that spot, no sir.

Q. Did you measure it at several spots?

A. At several spots, yes, sir.

Q. It varies between 21 and 22?

A. Yes, sir.

Q. You made it in accordance with your measurements on that highway?

A. Yes, sir.

Q. According to the scale of that automobile carrier-all, how long would that automobile carrier be in actual feet?

A. 20½ inches would equal 41 feet.

Q. It would be 41 feet?

A. Yes, sir.

Q. If that is true it is a bit smaller than the carrier-all, if the carrier-all is admitted to be 44 feet?

A. Yes, sir.

Q. What would be the width of the carrier-all under that scale?

A. Eight feet.

Q. And under that scale, what is the length of the tractor?

A. The tractor would be eight feet.

Q. And what is its width?

A. From the center of the tire to the center of the tire would be four feet.

Q. Is that a correct representation of the road as it appears at that section?

A. Yes, sir.

Cross Examination.

By Mr. Sharpe:

Q. Mr. Witness, have you put down every road, main or connecting road, at that identical point?

A. State that again, please?

Q. I understand that you have testified that you have shown on this drawing every road that connects at that identical point?

A. As well as I remember, yes, sir.

Q. You did that surveying yourself?

A. Yes, sir.

Q. What date is that?

A. February 28th and 29th.

Q. Did you see a dirt road there?

A. Yes, sir.

Q. Don't this dirt road come up here?

A. I had it come in right in here. This is considered the drive way.

Q. This is the road on up here? The road comes on up here, don't it? You don't show it up there, do you?

A. I don't show any outline of the road.

Q. Would you mind marking it there, so it will speak the truth?

A. All right.

Q. Isn't it a fact that there is only 234 feet from this house here to where this road intersects by actual survey?

A. I will have to get my measurements. I don't have the distances on this map.

Q. Could you use this cale?

A. Yes, sir, at what point do you mean?

Q. Begin here, where it comes in here?

A. I get around 320 feet.

Q. This road comes on up here?

A. Yes, and goes into this drive way.

Q. It was available for traffic at that time?

A. Yes, sir.

Q. So the paved road is not the only available means of travel for either a truck or a car at this point?

A. No, sir.

Q. Did you make any measurements on this particular tractor involved in the accident?

A. No, sir.

Q. Who pointed out this scene there, where you have the red cross? Who pointed that out to you?

A. Mr. Knox.

Q. Mr. Knox. None of the witnesses who were present at the time of the accident and knew anything about it pointed it out to you?

A. Not as I know of, no, sir.

Q. Have you ever seen this particular tractor that was involved in the accident?

A. I don't believe so. I am not certain. We saw some tractors similar.

Q. Have you ever seen an identical tractor like that?

A. I saw the same type of tractor, but whether it was identical or not, I don't know.

Q. You would not be able to identify a photograph of a tractor as to whether it was exactly like that one or not, would you?

A. Please state that again.

Q. Would you be able to examine this picture and see if it looks like the back end of this tractor or one identical like it?

A. It looks similar, sir.

Q. I hand you another one here.

Mr. Highsmith:

Would you mind identifying the picture?

Q. All right, I will hand you one that we will call "Defendant's No. 1," and this one as No. 2 and this one as No. 3. Now, what do you call this piece that

comes down here on the side of the tractor? Do you have any name for that?

A. Right here?

Q. This piece here to which the pull bar is attached?

A. I am not that familiar with tractors.

Q. Well, does that look like the back end of tractor that was similar to it?

A. It is similar, but I don't know whether it is exactly like it or not.

Q. The tests you made were in the daytime?

A. Yes, sir.

Q. At about what time?

A. In the afternoon.

Q. Was it fair?

A. Yes, sir.

Q. Was the sun shining?

A. Yes, sir.

Q. A perfect day?

A. It was a nice day.

Q. Then it could be entirely and totally different from the day that you were out there then it would be at 9:00 or 9:30 at night on a dark night, couldn't it? The conditions could be entirely different at night?

A. One would be night and one would be day.

Q. Well, isn't it a physical fact that there would be quite a difference?

Mr. Highsmith:

He answered that. He said one would be at night and one in the day.

The Court:

What do you say?

Mr. Sharpe:

The point is, Your Honor, he certainly couldn't see as far at night as he could in the day time.

The Court:

Well, you can ask him that question, but I think the answer is self evident, but you can ask him the question. Go ahead.

Q. There would be a difference, wouldn't there?

A. Yes, sir, it would be the difference between night and day.

Q. I hand you here a picture identified as No. 4, and ask you if that doesn't look exactly like the back of one of those tractors?

A. Well—

Q. —isn't that the identical model?

A. I can't say it is, no, sir.

Q. Well, does it look like it?

A. It is a tractor is all I can say.

Q. Where is the back light on that tractor? It is almost in the center, isn't it?

A. Yes, sir.

Q. Almost in the center, between the wheels?

A. It is some distance from the center.

Q. If you didn't know all about this tractor how did you build this scale model then?

A. That is a bought tractor. I just put a bar on the back.

Q. You didn't build this model?

A. No, sir, I didn't build it. It was just a bought model and I just put the bar on the back.

Q. It is just for the purpose of illustration?

A. That's all.

Q. All right. I notice here that you have the light way over on the left. It doesn't show on the left here, does it?

A. I have looked at quite a few tractors but the light on all of them are not the same.

Q. You have it further over on the left here than it is in this picture here. That was just an opinion of yours to illustrate a tractor, the location of it, as pointed out by Mr. Knox, is that correct?

A. Yes, sir.

Q. Now, did you examine the trailer and truck that was involved in this wreck?

A. No, sir.

Q. Then where did you get the figures about building this one?

A. From the trucks, from other trucks of the same company coming by.

Q. Bring your rule here, please. According to this scale, how much room is left on the side of the road from the center line?

A. 10½ feet or 11 feet.

Q. How wide do you show your tractor?

A. This part is not quite 8 feet. It is about 7 7/10 feet

Q. How much?

A. It is not quite 8 feet. It is about seven and seven-tenths feet.

Q. You mean that this truck would cover up all but three feet of a half of the road?

A. Practically, yes.

Q. I know, but do you know the tractor that was involved in this wreck?

A. No, sir.

Q. You didn't see it?

A. No, sir.

Q. And this is based on information furnished you by an attorney in this case?

A. Yes, sir.

Q. Who told you where to put the lady on the back of the tractor?

A. Mr. Highsmith.

Q. Did he tell you to sorta crook it around this way, too? That is what the model says.

A. I was told that she was leaning over his shoulder with one hand on his shoulder.

Q. Was she leaning sorta like this?

A. Well, it might have tilted some since I put it on there.

Q. Well, it is leaning now, isn't it?

A. Yes, I would say it is leaning some now.

Q. Well, when you put it on there was it leaning, or did you have it straight?

A. Let me see. That is just the position I put it on.

Q. Did you put it on just like it is now?

A. I couldn't say that it is exactly like it.

Q. What is that lady made out of—plastic?

A. Rubber, something similar to it.

Q. Now, set her up perfectly straight.

A. You mean like this.

Mr. Highsmith:

Your Honor, it is easy to break, and we have it to illustrate with, for illustration purposes, and we will introduce testimony that she was leaning on her husband's shoulder.

The Court:

Well, the jury will have seen both positions. Go ahead.

Q. What I am driving at is that when you put this lady on side ways it was to show the light was on the left, wasn't it?

A. What?

Q. When you had her leaning side ways, with the light way out to the left, that was so the jury could get the idea that the light was visible, wasn't it?

A. I didn't put the lady on there the last time she was put on there. I don't know who put it on there.

Re-Direct Examination.

By Mr. Highsmith:

Q. I exhibit to you what purports to be a picture of a broken down tractor, marked "P-1", plaintiffs' Exhibit 1, will you state whether or not you had that exhibit at the time you were preparing this model?

A. Yes, sir, I did. I used that picture.

(Witness Excused.)

WALTER W. THOMPSON, sworn for the Plaintiffs, Testified.

Direct Examination.

By Mr. Highsmith:

Q. You are Walter W. Thompson?

A. Yes, sir.

Q. What is your occupation? What do you do?

A. I am manager for Cook Company.

Q. Do you have a hobby of any kind?

A. I am an amateur photographer.

Q. Were you called upon to make some pictures to be used in this case?

A. Yes, sir.

Q. I hand you a picture marked as Plaintiffs' Exhibit No. 1, and ask you where that picture was taken, and what is it a picture of?

A. Farm equipment that we kept in a lot there in Hazlehurst.

Q. Who was present when it was made?

A. You and Colonel Knox and one of the employees of the Farm Equipment Company.

Q. Is that Mr. Woodard?

A. No, sir, it was a slender fellow.

Q. Was it pointed out to you as the Floyd tractor?

A. Yes, sir.

Q. I exhibit to you a picture purporting to be the wheels of a tractor, marked Plaintiffs' Exhibit No. 2. Did you take that picture?

A. Yes, I did.

Q. Where was that picture taken?

A. This was made at the same place, the place the tractor was made. This wheel was lying along side of it.

Q. Were the same people present?

A. Yes, sir.

Q. Was it pointed out as being the wheel of the Floyd tractor?

A. Yes, sir.

Q. I exhibit you a picture of a carrier-all, an automobile carrier, tractor and trailer, of the Complete Auto Transit Company, Atlanta, Georgia, and marked on it "Chevrolet", and ask you if you made that picture?

A. Yes, sir.

Q. Do you recall the approximate date that you made that picture?

A. No, sir, but it must have been about a month or two ago.

Q. Is that a correct representation of the Complete Transit Company carrier-all truck and trailer?

A. Yes, sir, as far as I know.

Q. Are these others true and correct representations of the objects they purport to portray?

A. Yes, sir.

Q. Do you do some aerial photography?

A. Not as a rule.

Q. But did you do it in this case?

A. Yes, sir.

Q. Are you familiar with a section of State Highway No. 15, right southeast of Hazlehurst, running from the Chick Carter place on which Deroy Floyd lived on beyond the Shuman place toward town?

A. Yes, sir.

Q. Is that a true and correct aerial photograph there?

A Yes, sir.

Q. That is Plaintiffs' Exhibit No. 4.

A. Yes, sir.

Cross Examination.

By Mr. Sharpe:

Q. When were these pictures made?

A. Those pictures were made, lets see—

Q. I don't mean the exact date?

A. About two or three months ago.

Q. If the accident in question occurred on the 26th of July, that would be about six months after the accident?

A. Yes, sir.

Q. You didn't make the pictures immediately after the accident?

A. No, sir.

Q. The tractor that you took a picture of and the trailer, that wasn't involved in the accident?

A. No, sir, I don't think so. I don't believe it was.

Q. No one told you it was?

A. No, sir.

Q. You just made a picture of a truck?

A. Yes, sir.

(Witness excused.)

TOM D. PAIR, sworn for the Plaintiffs, Testified

Direct Examination.

By Mr. Highsmith:

Q. Where do you live?

A. I live on the Russell Evans place now.

Q. In Jeff Davis County?

A. Yes, sir.

Q. On July 26th, 1955, where did you live?

A. On the Alma Highway, on the Ussery place.

Q. Do you recall the night that a collision occurred down the highway from your house between a farmall tractor and a truck and trailer?

A. Yes, sir.

Q. Were you living at that place at that time?

A. Yes, sir.

Q. Did you know Deroy Floyd and Mammie Floyd at that time?

A. Yes, sir.

Q. Where did they live with respect to your house?

A. They lived right kinda opposite me at that time, kinda this way, up the road toward town from me.

Q. Look at this exhibit just a minute. I will show you an exhibit prepared by the Harrington Engineering Company, showing a portion of U. S. Highway No. 23, and it has designated thereon a residence which is marked "Pair residence". Is that where you lived at that time?

A. Yes, sir, it is.

Q. It also has marked on here "Floyd residence". Is that where Mammie and Deroy Floyd lived at that time?

A. Yes, sir.

Q. On the evening of July 27, 1955, did you see a tractor, a farmall tractor, leave the Floyd residence and turn into the highway and go in a northwest direction toward Hazlehurst, Georgia?

A. Yes, sir.

Q. Where were you sitting at that time?

A. On my front porch.

Q. Could you see Deroy Floyd drive away on that tractor?

A. Yes, sir.

Q. Could you see the Floyd drive way from where you were sitting on your front porch?

A. Yes, sir.

Q. Could you see on beyond it?

A. Yes, sir.

Q. How far beyond the Floyd drive way toward Hazlehurst could you see?

A. About a hundred yards, I reckon.

Q. About what time of night was it?

A. I don't remember, but it was close to my bed time.

Q. What time did you usually go to bed?

A. Around 8:30 or 9:00 o'clock.

Q. In that neighborhood?

A. Yes, sir.

Q. Was it a normal night? Was it raining, or fair weather? What was the condition of the atmosphere?

A. It was a normal night.

Q. The atmospheric conditions were normal?

A. Yes, sir.

Q. When the tractor left the drive way of the Floyd residence, could you see one or more people there?

A. Yes, sir, I could see them come out and get on the tractor.

Q. Was there a person driving the tractor and a person standing on the bar back of the tractor?

A. Yes, sir.

Q. As he came out the gate, did you see the lights on the tractor?

A. Yes, sir.

Q. Where was the light?

A. He had headlights in front, and when he came out the gate and turned to go up the road I saw the other light on the back of the tractor. It looked like a spot light.

Q. As it went down the road, did you see it?

A. Yes, I could see the light on down the road as far as I could see the tractor—see the light. The bushes cut off my vision of it there.

Q. Was the front light and the rear light burning?

A. Yes, sir.

Q. Shortly after the tractor went out of the drive way at the Floyd residence and went on toward Hazlehurst, what passed your house, if anything?

A. A complete Transit truck, or convoy.

Q. Similar to this one on the model here?

A. Yes, sir.

Q. Normally called a carrier-all?

A. Well, we call it a convoy.

Q. Which direction was it going at that time?

A. Toward Hazlehurst.

Q. What happened, if anything, after it passed your house?

A. About the time it came along I was fixing to get up and go in the house, but it was coming so fast I hesitated just a minute, and my wife said—

Q. —you can't tell what your wife said.

A. Well, anyway he was running pretty fast and and she said to me and I—

Q. You can't tell what your wife said to you, Mr. Pair.

A. I can't tell what I said to her?

Q. No, sir.

A. Well, he was running pretty fast at that time of night, unusually fast at that time of night.

Q. Have you noticed the speed of trucks and cars on the highway from time to time?

A. Yes, sir, I have.

Q. Have you had experience in judging the manner and speed of automobiles and trucks passing up and down the highway?

A. Yes, sir. I can estimate it.

Q. In your opinion, what was the lowest speed, your estimation, that truck and trailer was making, or was travelling at that time?

A. Around 55 miles an hour.

Q. That is your lowest estimate of the speed?

A. Yes, sir.

Q. Did you hear it go on down the highway toward Hazlehurst?

A. Yes, sir.

Q. Did you hear a crash down the highway after it passed your house?

A. Yes, sir.

Q. You didn't know what the crash was at that time?

A. No, sir.

Q. At anytime after you saw that Carrier-all truck pass your house and go on down the highway until you heard the crash did you hear the motor diminish in sound?

A. No, sir.

Q. It continued on at the same high speed?

A. Yes, sir.

Q. Did you see Mrs. Floyd any more after that night?

A. No, sir.

Q. You didn't see her again after that night?

A. No, sir.

Cross Examination.

By Mr. Sharpe:

Q. Where is your house at here?

A. Way up in the corner there.

Q. How far is it from your house to the Floyd house?

A. About 50 yards.

Q. You were sitting on your front porch here?

A. Yes, sir.

Q. When the tractor came out you had a right angle view of it?

A. Yes, sir.

Q. You had a better view of one one behind here?

A. Yes.

Q. When it turned out in the road that placed the back of the tractor at an angle to you?

A. No, sir. It was right straight down the highway in front of my house.

Q. You said it left this house here?

A. It did.

Q. Then it would be straight from your house?

A. Not the house it would not, but the road it would, but still the road goes straight until it gets above my house and then it makes a turn.

Q. The tractor was going toward Hazlehurst? (indicating on map.)

A. Yes, sir.

Q. Would you put this at an angle? From where you identified where the tractor came into the road here, it shows at an angle, don't it?

A. You mean from my house or Mr. Floyd's house?

Q. The direction the tractor was coming?

A. It was coming this way, and that throwed the light upon my porch.

Q. After he turned toward Hazlehurst?

A. I didn't see the headlight any more, but I did see—

The Court:

He said he saw the light on the back end.

Q. When he turned up the highway from the house, did you see the lady on the back of the tractor?

A. Yes, as he came out the gate.

Q. What size woman was she?

A. A small woman.
Q. About 125 pounds?
A. I wouldn't say.
Q. Well, was she a normal size woman?
A. Yes, about the size of that lady there.
Q. This one here? (indicating.)
A. Yes, sir.
Q. How tall was she?
A. About the same height.
Q. Hanging on to the driver of the tractor?
A. No, sir.
Q. Was she standing up straight?
A. Yes, sir.
Q. Did she have her hand on the shoulders of whoever was driving?
A. She was holding the fender on the side of the tractor.
Q. Did she have on a light dress or a dark dress?
A. A light looking dress.
Q. What kind of a light was on the back?
A. A big white light.
Q. Have you ever driven a big farmall tractor?
A. No, sir. I am familiar with them though.
Q. A farmall tractor is the only one in the world where a brace comes from the axle pass the steering and comes around in a semi-circle?
A. Yes, I guess so.
Q. That is the only tractor that has that?
A. I think so.
Q. Do you know what this is here for? (indicating.)
A. I suppose it was on there for lifting.
Q. Do you know the distances between them?
A. On a Ford tractor.
Q. On a farmall tractor?
A. It was longer than that.

Q. What?

A. About like that. (indicating.)

Q. Is it your testimony that it is more than 19 inches?

A. Around 19 or 20.

Q. Let's make it 20.

A. All right. It could have been longer than that.

Q. There is a pull marker that comes on each side?

A. A bar.

Q. And that is the only place for a person to ride? (indicating.)

A. Yes, sir.

Q. The light is under the seat here?

A. No, sir; it was up here.

Q. Where?

A. Right here, right behind the driver.

Q. On the left fender?

A. Well, I don't know about that.

Q. Where else could it be except the left fender or the seat?

A. I said right behind the driver's seat.

Q. It is under the seat then?

A. I don't know about that.

The Court:

He said three times that he didn't know. Mr. Sharpe.

Q. I hand you a picture marked D-4. Is that the way one looks?

A. Yes, sir.

Q. They are not on the left side of the fender?

A. The left side of the tractor, the seat, yes.

Q. On the seat?

A. Yes, sir.

Q. This little bar here is what we are talking about. That is the bar the lady was standing on?

Mr. Sharpe:
I tender this in evidence as D-4.

The Court:
All right, if it has been identified.

Mr. Sharpe:
It has been identified.

The Court:
All right.

Q. This looks like a farmall tractor?
A. Yes, sir.
Q. That is a fair representation of one?
A. It looks like it.

The Court:
Is that the same type that was involved in the wreck?

The Witness:
Yes, sir.

Mr. Highsmith:
Some of them have lights in different positions.

The Court:
He testified it was the same type, and I will admit it in evidence. You may proceed.

Q. Did you see the tractor after it was involved in the accident?

A. Not until the next morning.

Q. I hand you a picture marked D-1 and ask you if that is the way it looked the next morning?

A. Yes, sir.

Q. I hand you another one marked "D-2", and ask you if that is the way it looked the next morning?

A. Yes, sir, that's a side view.

Q. I hand you one marked "D-3" and ask you if that is the way it looked the next morning?

A. That is about the only one I could tell where the wheel was broken off.

The Court:
Which one is that now?

Mr. Sharpe:
D-3.

The Court:
Is that the same one?

The Witness:
Yes, sir.

The Court:
You did not identify the other two?

The Witness:
No, sir.

Q. You identify this one here?

A. Yes, sir.

Q. That shows where the light was the next morning on it?

A. Yes, sir.

Q. On the left side of the seat?

A. Yes, sir.

Q. I believe you identified this as a similar tractor. The light is four inches inside here, where the bar comes down, that steel rod going—

Mr. Highsmith:

What?

Q. The piece of steel you stand on to ride on these trucks, or tractors?

The Court:

He identified it, I thought.

Mr. Highsmith:

He can ask him about the tractor that has been identified as the same tractor. He can ask about the light on the tractor identified as the same tractor, if Your Honor please, but he is asking him about another one four inches over to the right.

The Court:

He said it was similar, but that the light didn't set like it did on his truck. Go ahead, lets get through.

Q. Now, the light on this big picture shows the light just to the left of the driver's seat?

A. Yes, sir.

Q. The other one that you said looked that way the next morning was just left of the driver's seat?

A. Yes, sir.

Q. Now, aren't the lights on those tractors identical?

A. Practically.

Q. If you draw a line straight from here to here—you said it was 20 inches across from here to here, and if you draw one there you leave about 14 inches on this draw bar? (indicating on picture.)

A. Yes, sir. I guess so.

Q. Now, Mr. Pair, was there a great deal of traffic on that highway at that time of night?

A. Not at that time of night, only a few cars had passed.

Q. But ordinarily there was a lot of traffic on that highway?

A. Yes, sir.

Q. Both day and night?

A. Yes, sir.

Q. There was more traffic on that road than any road in the county?

A. I wouldn't say about that, but there is a good deal of traffic.

Q. The surface of that highway is black along there?

A. Yes, sir.

Q. A farmall tractor is red?

A. Yes, sir.

Q. And the white light on a tractor, a farmall tractor, doesn't show very far when reflected down on the black surface of the highway, does it?

A. It doesn't throw a light very far down the road where you are going, but it shows up here. You can see the light on a tractor.

Q. Did you have the light turned on on your front porch?

A. No, sir.

Q. There was no light to detract from the tractor?

A. No, sir.

Q. Did this tractor have good lights?

A. Yes, sir, it had good lights.

Q. Did they shine up the road?

A. Yes, sir.

Q. He was on his proper side?

A. Yes, sir.

Q. On his proper side of the highway?

A. Yes, sir.

Q. You were looking at him?

A. Yes, sir, until he got out of sight.

Q. Did this big truck and tractor have good lights on it?

A. Yes, sir.

Q. Was he also on his proper side of the road when he passed your house?

A. Yes, sir.

Q. Then this big truck and trailer had lights that detracted from the little tractor?

A. The big truck, when it came by, it had gone out of my sight.

Q. I see. The tractor lights remained like it was the last time you saw them?

A. Yes, going on up the road.

Q. Had this wife, or lady, been standing behind the man who was driving the little tractor, it would have been impossible to have seen the light on the little tractor?

A. Well, I guess so, if she had got directly behind the light, but when I saw the light, they could have seen it.

Q. But you don't know where she was when the accident happened?

A. No, sir.

Q. You don't know where this lady was standing on the little tractor when this accident happened?

A. No, sir.

Q. She could have been on the left side?

A. I wouldn't say she could have.

Q. Well, she could have been on the left side, couldn't she?

A. I suppose so.

Q. She could have been standing right in the middle?

A. She wouldn't have had anything to hold to.

Q. Was there anything to keep her from holding on to the seat? Anything to keep her from holding on to this? (indicating on picture.)

A. No, there was nothing to keep her from it.

Q. She could have been standing in the middle, or she could have been standing on the left side?

A. She could have.

Q. She could have been standing on the right side?

A. Well, she was on the right-hand side, as far as I could see.

Q. I said after she got out of your sight, you don't know where she was standing?

A. I don't know about that.

Q. But irrespective of where she was standing, she only had 19 or 20 inches to move down there?

A. Well—

Q. —Well, let me ask you this: How fast was the tractor going when it passed your house?

A. It just turned in there. It wasn't running at a very great speed.

Q. Was it running five, ten or fifteen miles an hour when it came out and started up the road?

A. Well, I don't know how fast, but it wasn't running very fast.

Q. Is there a dirt road leading from your house toward Hazlehurst?

A. Above where I live.

Q. How far is it above your house?

A. It is a good piece up there.

Q. Well, approximately how far is it?

A. Well, I would say somewhere around 200 or 250 feet.

Q. Is this dirt road travelled any?

A. Yes, sir.

Q. It was opened to anyone who wished to use it?

A. Yes, sir.

Q. Automobiles and trucks can use it?

A. Yes, sir.

Q. The highway and this dirt road both lead to Hazlehurst?

A. Yes, sir.

Q. And there is very little difference in the distance from there to Hazlehurst?

A. There is not much difference.

Q. That would be a much safer route for a small tractor to go than down this much travelled highway?

A. I don't know. It could have happened on the dirt road as well as out there on the highway.

Q. Have you ever seen any big transportation trucks and trailers using this dirt road?

A. No, sir.

Q. But you see them on the highway every day?

A. Yes, sir.

Q. Mr. Floyd had lived on this paved road a long time?

A. Yes, sir.

Q. And there were big trucks up and down this paved highway every day and night?

A. Yes, sir.

Q. But you have never seen one on that dirt road?

A. No, sir.

Re-Direct Examination.

By Mr. Highsmith:

Q. You ride on the highways despite the trucks, don't you?

Mr. Sharpe:

Now if Your Honor please—

The Court:

—yes, I rule that out. That's an improper question. I sustain the objection.

Mr. Highsmith:

I want to get it straight as to which pictures the defendant has introduced in evidence. I understand he has introduced in evidence picture "D-4", and which is a picture of the other truck or tractor, and the picture, D-1, is a picture of the tractor identified in this instance, and I would like to know which ones have been introduced and which haven't been introduced.

The Court:

He wants to know if they are in evidence.

Mr. Sharpe:

I will introduce them when the time comes.

The Court:

Well, he wants to know if those have been introduced now, and I would like to know myself.

Mr. Sharpe:

This one has. (indicating.)

The Court:
How about the others?

Mr. Sharpe:
He identified one but he didn't identify the other one.

The Court:
Well, give him the two that you have introduced in evidence.

(Witness excused.)

MRS. TOM D. PAIR, sworn for the plaintiffs, testified.

Direct Examination.

By Mr. Highsmith:
Q. Are you the wife of Mr. Tom D. Pair?
A. Yes, sir.
Q. Where did you live in July, 1955, Mrs. Pair?
A. On the Alma highway.
Q. On the highway leading from Alma, Georgia, to Hazlehurst, Georgia?
A. Yes, sir.
Q. Did you live across the highway from Deroy Floyd and his wife, Mammie Floyd?
A. Yes, sir.
Q. How far did you live from them?
A. About a hundred yards, I reckon.
Q. About a hundred yards?
A. Yes, sir.

Q. Do you remember the occasion of a collision between a farmall tractor driven by Mr. Deroy Floyd and an automobile-carrier? Do you remember when that happened, the occasion when that happened?

A. Yes, sir, I remember it was on a Wednesday night.

Q. But you remember the occasion of it?

A. Yes, sir.

Q. Did you see the farmall tractor drive out of Mr. Floyd's drive way?

A. Yes, sir.

Q. Where were you?

A. Sitting on the front porch.

Q. Sitting on the front porch of your home?

A. Yes, sir.

Q. Did you see it proceed down the highway toward Hazlehurst?

A. Yes, sir, until he made a bend about a hundred or two hundred yards from the house and then we couldn't see it for the bushes.

Q. What kind of lights did the farmall tractor have?

A. Two good headlights and a pretty good light in the rear end.

Q. Was there a man driving the farmall tractor?

A. I couldn't see that good from where I was sitting.

Q. Could you see anybody standing on the draw bar on the back of the farmall tractor?

A. No, sir, I just saw the light.

Q. You could see the back light?

A. Yes, sir, as far as I could see it around the bend.

Q. Mrs. Pair, shortly after the farmall tractor had gone on toward Hazlehurst, did an auto-carrier truck,

similar to the one shown on this model here, pass your house?

A. Yes, sir.

Q. Was it going in the same direction toward Hazlehurst?

A. Yes, sir.

Q. Have you rode in automobiles and notice what speed they were making?

A. Yes, sir.

Q. Have you seen a great many cars and trucks pass your house, both day and night, and have occasion to judge the speed they were going?

A. Yes, sir.

Q. What speed would you say that this auto-carrier was making at the time it passed your house?

A. To the best of my knowledge, I would say he was making around 50 or 55 miles an hour.

Q. Would you say it was less than 50 or more than 50 miles an hour?

A. I would say it was more than 50.

Q. Now, shortly after that auto-carrier passed did you hear a crash down the road?

A. Yes, sir.

Q. Down toward Hazlehurst from your house?

A. Yes, sir.

Q. Had the auto-carrier decreased its speed up until the time you heard the crash?

Mr. Sharpe:

If Your Honor please, that would be purely a conclusion of the witness. She said they were both out of her sight at that time.

Q. Well, had the sound of the motor of the auto-carrier decreased any at the time you heard the crash?

A. No, sir, it was the same thing right on.

Cross Examination.

By Mr. Sharpe:

Q. Mrs. Pair, in answer to Mr. Highsmith's question you said it was running about 50 or 55 miles an hour, but when he insisted about the third time you got it up a little over 50 miles an hour. Now, which was right?

A. I couldn't say just how fast it was running, but it was moving along.

Q. It could have been 45, or 48, or 49, or 50 miles per hour, couldn't it?

A. I don't know about that.

Q. As a matter of fact, Mrs. Pair, you don't know how fast it was going?

A. No, sir, but I know it was going like I said it was when it passed my house. He was moving along.

Q. It is purely a rank opinion of yours as to whether he was going 45 or 55 miles an hour?

A. I would say 45 or 50.

Q. 45 or 50 miles an hour?

A. Yes, sir.

Re-Direct Examination.

By Mr. Highsmith:

Q. Can you make an estimation as to whether he was travelling fast or slow?

A. You mean—

Q. —Just make an estimation if it was going fast or slow at the time you saw it?

A. It was going fast.

Q. That's all.

(Witness excused.)

MRS. CLINTON BECK, sworn for the plaintiffs, testified:

Direct Examination.

By Mr. Highsmith:

Q. You Mrs. Clinton Beck?

A. Yes, sir.

Q. Do you live in Jeff Davis County?

A. Yes, sir.

Q. In July, 1955, did you live adjoining the highway from Alma to Hazlehurst, Georgia?

A. Yes, sir.

Q. Mrs. Beck, do you remember the occasion back in July, 1955, when a truck carrier-all, an auto-carrier, ran into the tractor, farm-all tractor, of Mr. Deroy Floyd?

A. Yes, sir.

Q. At the time it happened, where were you?

A. I was in my back bed room.

Q. I show you a drawing make by the Harrington Engineering Company of a portion of U. S. Highway 23 that has marked on here "Beck Residence". Is that where you lived at that time?

A. Yes, sir.

Q. You were in the back bed room of the house?

A. Yes, sir.

Q. Just prior to the collision did you hear the motor of a vehicle coming down the highway?

A. Yes, sir.

Q. Was it a large tractor or a large truck of some kind?

A. Yes, sir.

Q. Some kind of a large vehicle?

A. Yes, sir.

Q. What was the sound of its engine? Was it loud or low?

A. Very loud.

Q. Did you form an estimate or an opinion as to whether it was going fast or slow from the noise it made?

Mr. Sharpe:

I have tried a lot of cases, but I have never heard of proving the speed of an automobile by the sound of the motor before. It is common knowledge that a Diesel engine makes a terrific noise.

Mr. Highsmith:

If he wants to testify, Your Honor, he ought to take the stand.

Mr. Sharpe:

I am not going to attempt to testify. I am just stating a fact that everybody knows.

The Court:

I agree with you, Mr. Sharpe, that she couldn't testify to the speed sitting in a back room listening to the motor. I sustain the objection.

Q. Mrs. Pair, have you lived on the highway for sometime?

A. Practically four years.

Q. Have you seen vehicles of this nature pas. your house on the highway both day and night during that time?

A. Yes, sir, I have.

Q. Now, having observed them pass your house day and night and having observed their speed and the sound of the motors in passing, do you know whether they are going fast when the motor is making a loud noise, or going slow when they are making a loud noise?

A. I wouldn't say about that.

Q. Well, was there any diminish in the sound of the motor that night from the time you first heard it until you heard the crash?

A. No, sir, it did not get slower.

Q. Did you hear the crash that night?

A. Yes, sir.

Q. When you heard the crash, what did you do?

A. I went to the door, and then went and got my house coat and went outside, and Mr. Floyd was holding Mrs. Floyd in his arms and I got her and brought her to my house and bathed her.

Q. Did you hear anyone crying?

A. No, sir, only Mr. Floyd hollowering for help.

Q. You heard Mr. Floyd hollowering for help?

A. Yes, sir.

Q. When you got out there, where was she laying?

A. Almost on the white line of the pavement.

Q. Where was the tractor?

A. Over in the ditch.

Q. Would you mind stepping down here just a minute? Assuming that this is your drive way, and

this the concrete marker, would you put this small peg about where she was laying?

A. She was laying practically like this, in the highway, almost practically like this.

Q. About in front of the concrete marker?

A. Yes, sir.

Q. Was the tractor broken up?

A. Broke half in two.

Q. Place that where it was?

A. It was like this, kinda over this way. The other wheel was laying under there, that way. It was here until they moved it. They left it laying there, like this.

Q. That was about the way you saw it?

A. Yes, sir.

Q. How long did Mrs. Floyd stay at your house?

A. About 15 minutes.

Q. How did she leave your house?

A. In an ambulance.

Q. Did she have an injury to her head?

A. Yes, sir, she had an injury up here on her head, a little hole in her head, up here. (indicating on head.)

Q. And that was back toward the back of her head?

A. Yes, sir.

Q. Did she claim she was feeling all right?

A. Yes, sir, she claimed that she was feeling all right.

Q. Who helped her in the house?

A. Me and my husband's brother-in-law from Jacksonville.

Q. And when she left, how did she leave?

A. In the ambulance.

Q. Did you see her any more after that?

A. No, sir; I didn't see her any more.

Q. She was your neighbor?

A. Yes, sir.
Q. Did you ever see her again?
A. Not until after she was a corpse.
Q. And how many days after that was it, just approximately—two or three days after that?
A. Yes, sir.
Q. Two or three days after that?
A. Yes, sir.

(No Cross Examination.)

(Witness excused.)

MRS. KATHY SUE CARTER, sworn for the plaintiffs, testified:

Direct Examination.

By Mr. Highsmith:
Q. Are you Mrs. Kathy Sue Carter?
A. Yes, sir.
Q. Where do you live, Mrs. Carter?
A. In Hazlehurst, Georgia.
Q. In Jeff Davis County?
A. Yes, sir.
Q. Do you remember the occasion in last July when an auto-carrierall truck ran into a farmall tractor driven by Mr. DeRoy Floyd?
A. Yes.
Q. Were you visiting at a house on that highway that night?
A. Yes, sir.
Q. Whose house were you visiting at?
A Mrs. Shuman.

Q. I call your attention to a drawing made by Harrington Engineering Company of a portion of U. S. Highway No. 23, and it has indicated thereon the Shuman residence, is that where you were?

A. Yes.

Q. Directly across from that and to the south is the Beck residence?

A. Yes, sir.

Q. Is that where the accident happened?

A. Yes, sir.

Q. Did you see this farmall tractor coming down the road?

A. I sure did.

Q. Did it have a light on the back of it?

A. Yes, it did.

Q. Did it have lights on the front?

A. Yes, sir.

Q. Was there any object following along back of the tractor?

A. A white dog.

Q. Had you seen that dog before?

A. Before the truck came?

Q. Before this night?

A. No.

Q. You didn't know whose dog it was?

A. No, sir; I don't know whose dog it was.

Q. How could you see in the back of the tractor? Was that light reflecting on there?

A. Yes.

Q. You saw the dog in the reflection of the back light?

A. Yes, sir.

Q. Did you see an automobile carrier-all truck coming from the same direction and going in the same direction as the farmall tractor?

A. Yes.

Q. Was that automobile carrier-all similar to the model that I exhibited to you on the table here?

A. Yes, sir.

Q. Does it look like that one to you?

A. Well, it resembles it.

Q. Do you recall whether it had the words "Complete Auto Transit" on it?

A. No, sir.

Q. You didn't examine it that close?

A. No, sir.

Q. What side of the road was the tractor being driven on?

A. The right side there.

Q. On the right-hand side of the road?

A. Yes.

Q. As far as you could tell, was it on the right-hand edge of the road?

A. Well, it was on the pavement.

Q. As far as you could see?

A. Yes.

Q. Have you had occasion to observe trucks and automobiles and motor vehicles pass up and down the highway and know how fast they were travelling? Have you seen them on the highway? Have you ridden in cars, or drove cars, and know how fast they were going?

A. I am not too good about estimating things.

Q. How is that?

A. I say, I am not very good on estimating speed.

Q. Do you have an opinion as to the speed that automobile truck carrier-all was making?

Mr. Sharpe:

Now, if Your Honor please, there has been no foundation laid for that. She testified that she was not too good at estimating speed.

The Court:

You can ask her if she could testify as to the speed of automobiles by her past experience. You can ask her that.

Q. By your past experience can you make an estimate of the speed?

A. Yes, sir.

Q. From your experience in driving cars and see them being driven and the speed they were making?

A. Yes, sir.

Q. What was the speed, in your opinion, of that carrier-all truck was making at the time it hit the farmall tractor?

A. Between 55 and 60.

Q. When it hit the farmall tractor, was there any other vehicle coming from Hazlehurst at that time?

A. No, sir.

Q. Was there anything coming from toward Hazlehurst?

A. No, sir.

Q. As far as you could determine, was there anything to prevent the automobile carrier truck from turning to the left and passing this tractor?

Mr. Sharpe:

That is purely a conclusion, if Your Honor please.

The Court:

Well, if she could see it, it wouldn't be.

Q. Did you see the position of the farmall tractor on the highway?

A. Yes, sir.

Q. Have you seen that highway frequently and know its approximate width?

A. Yes, sir.

Q. Have you seen other cars pass going in the same direction?

A. Yes, sir.

Q. As far as you could see, was there anything to prevent the auto-carrierall truck turning to the left and passing the farm tractor?

A. Yes, it could have passed.

Q. There was nothing to prevent it passing?

A. No, sir.

Q. Did it pass it?

A. It hit it.

Q. Did you see some one fall in the road?

A. No, sir, I didn't see it. We got up and went in the house.

Q. Was there some reason why you went in the house? Did you go in the house slow or fast?

A. Pretty fast. It looked like it was going to hit over in the yard there at the Shuman house and we got up and went in the house pretty fast.

Q. You mean after this automobile carrier-all truck hit the farm tractor it looked like it was coming on into the house?

A. Yes, sir.

Q. You all went in the house? Did you all later go out there on the road?

A. Yes.

Q. Was Mrs. Floyd still there, or had she been taken up?

A. No, she had been taken up.

Q. The tractor, where was it?

A. Well, it was laying in the ditch torn up.

Q. Was the carrier-all truck still further toward Hazlehurst? Where was it?

A. Well, it was out in front of Mrs. Shuman's house—jack-knifed like.

Q. Jack-knifed on down beyond the house?

A. Yes, sir.

Q. Did this happen about in front of the Beck residence, about where that red cross is on this map?

A. Yes, sir.

Mr. Highsmith:

The witness is with you.

Cross Examination.

By Mr. Sharpe:

Q. How far from the scene of the accident did you first see the tractor driven by Mr. Floyd?

A. What?

Q. How far from where you say the accident occurred up the road when you first noticed Mr. Floyd?

A. How far was the trailer?

Q. No. Mr. Floyd, the gentleman who was driving the tractor? If this cross here represents where the accident taken place, how far up the road was it when you first noticed the tractor driven by Mr. Floyd?

A. Down the road, close by the other house.

Q. A vacant house down there?

A. Yes, sir, you could see it, way on down beyond there. It was a little further than that. We couldn't see it when he came out of the drive way of his house, but we saw him close to that vacant house there.

Q. Is this where you were living?

A. No, sir, up here.

Q. You couldn't see the house that Mr. Floyd lived in?

A. No.

Q. Could you see the house up here where Mr. Pair lived?

A. Well, I didn't look that way.

Q. You can't see that from your house?

A. Well, I just didn't look that way.

Q. Well, can you see that far, or is your view cut off?

A. Yes, sir.

Q. Now, when you looked up the road you saw the tractor and the dog?

A. Yes, sir.

Q. How fast was that tractor going?

A. About 12 or 15 miles per hour.

Q. Was the dog there when you first looked?

A. Yes, sir.

Q. Did the dog keep up with the tractor?

A. Yes, sir.

Q. Was he trotting or running, or how?

A. Well, he was trotting along behind the tractor.

Q. At that time did you notice the truck coming?

A. No, sir.

Q. You didn't see it then?

A No, sir.

Q. How far did the tractor travel before you first saw the truck?

A. Well, it was on up close to Mrs. Beck's house before I saw it.

Q. As a matter of fact, the accident happened a good long ways from your house, didn't it?

A. Not too far.

Q. Well, about how far would you say?
A. Well, I would say about 63 yards.
Q. It was only about 60 feet from your house to where the accident happened?

Mr. Highsmith:
She said yards.

A. 63 yards.
Q. When you first saw the tractor was it approximately here, (indicating), in front of this vacant house?
A. Yes, sir.
Q. Is that approximately right?
A. Yes, sir.
Q. Is it further from this house to where the accident occurred, or was it further from where you were when the accident occurred? Which would be the greatest distance?
A. About the same.
Q. About the same?
A. Yes, sir.
Q. So, this is where you saw the truck here?
A. Not the truck—the tractor.
Q. I know, but the tractor proceeded on down the road, didn't it?
A. Yes, sir.
Q. Then you say you saw the truck at about the same spot, is that what you said?
A. Yes, sir.
Q. So you observed this truck in front of this vacant house, where I have this rule pointed, to where the accident occurred, is that correct?
A. Yes, sir.

Q. So, that means you observed it for 180 feet, doesn't it?

A. Yes, sir.

Q. Did you keep your eyes on the dog and the tractor all the time?

A. I was keeping my eyes mostly on the dog. I wasn't particularly looking at the truck.

Q. So your attention was directed more to the dog than the tractor or the truck, is that correct?

A. Yes, sir.

Q. And yet during that split second of time you estimated the speed of the truck?

A. Yes, sir.

Q. And you were constantly watching the dog?

A. Yes, sir.

Q. Now, there were some other people that saw that truck that night, didn't they?

A. Yes, sir.

Q. How long have you been driving an automobile?

A. About three years.

Q. Have you ever driven one of these trucks?

A. No, sir.

Q. They have a big spout that comes out the side of the motor, or the cab, don't they?

A. Most of them, yes.

Q. And that motor makes a lot of noise, don't it?

A. Yes, sir.

Q. And it is very deceptive as to how fast a truck is going, isn't it, on account of the tremendous noise?

A. Yes.

Q. This truck could have been going 47, 48, 45, 51, 52 or 55 miles an hour, or 42 miles an hour, couldn't it?

A. Well, it wasn't though.

Q. Do you swear positive that, though you were looking at the dog, and the truck was only in your view for 180 feet, coming toward where you were sitting, with the tractor in front of it, with the lights of the tractor on your house where you were sitting, with the back light burning, with the lights of the truck burning, do this—do you swear positive that this truck was running 60 miles an hour? Is that your testimony?

A. I saw the dog, but I looked up at the truck coming. I seen the dog following the tractor, and about that time the truck come around the corner and I looked up from the dog.

Q. Are you pretty good on figures?

A. Well, not too good.

Q. Well, isn't it true that an automobile or a truck travelling—No, I will ask you this: How many seconds was it, approximately, from the time you saw the truck until it hit the tractor?

A. I don't know, but just a split second, I guess.

Q. Was it two seconds?

A. Yes, about two seconds.

Q. Two seconds? All right, isn't it true that a truck or an automobile travelling at 60 miles per hour will travel 212 feet per second? Is that right?

A. Yes, I guess so. I don't know.

Q. You said it was only 180 feet from where you saw the truck to where the accident occurred, is that right?

A. Yes, sir.

Q. That's all.

(Witness excused.)

FLOYD HARTSFIELD, sworn for the plaintiffs, testified:

Direct Examination.

By Mr. Highsmith:

Q. State your name, please?

A. Floyd Hartsfield.

Q. Mr. Hartsfield, what position, if any, do you occupy?

A. Trooper with the State Patrol.

Q. Did you occupy that position during July, last year, 1955?

A. Yes, sir.

Q. Were you called to the scene of a collision that took place on U. S. Highway, No. 23, and also known as State Highway No. 15, about a mile and a half northwest of the city of Hazlehurst?

A. Yes. I believe it was about two tenths of a mile south of Hazlehurst on No. 23.

Q. Did that take place in front of what is known as the Beck residence?

A. Yes, sir.

Q. Was it a collision between a carrier-all truck of the Complete Auto Transit Company and a farmall tractor driven by Deroy Floyd?

A. It was.

Q. Did you make an investigation of the accident at that time?

A. Yes, sir.

Q. Did you measure the distance that the tractor skidded after it hit the farmall tractor—I mean the distance the truck skidded after it hit the farmall tractor?

A. Yes, sir.

Q. How far was that skid mark?

A. A 124 feet.

Q. Now, how far from the drive way, from your best recollection, from the north drive way of the Beck residence—into the Beck residence, did the collision occur?

A. Eighteen feet.

Q. Eighteen feet?

A. Yes, sir.

Q. That was the measurement that you made at that time?

A. Yes, sir.

Q. And did you see some signs on the road where the tractor was knocked down?

A. Yes, sir.

Q. What portion of the road was that on?

A. It was on the right side, going north, in the right lane of traffic, going north.

Q. Was there any oil on the highway?

A. Yes, sir, there was some oil.

Q. Approximately how far toward the middle of the lane was that mark on the highway that you noticed?

A. Oh, I imagine it was about half way between the edge of the pavement and the center line, some thing like four feet from the edge of the road, something like four or five feet, I would say.

Q. Was the left wheel of the tractor knocked off?

A. Yes, sir; it was.

Q. From your examination of the road and the tractor, did you form the opinion that the remaining portion of the axle of that farmall tractor made that mark?

A. Yes, sir.

Q. That would have been the left axle of the farm tractor?

A. That's right.

Q. And that mark was about four feet from the right edge of the hard surface of the highway?

A. Yes, sir, something like four or five feet.

Q. And the oil sign was inside of that mark?

A. Yes, sir.

Q. Nearer toward the edge of the pavement?

A. The oil spot and the scuff mark on the pavement were about the same thing.

Q. Now, was there any sign of the automobile truck carrier-all having put on or applied any brakes prior to colliding with the farm tractor?

A. There were no skid marks.

Q. Were the first skid marks after that?

A. Yes, sir.

Q. About how far from the point of the collision to where the first skid marks were noticed?

A. Well, it was 157 feet, and the skid marks were 124 feet

Q. Did the skid marks commence and then go to where the truck was stopped?

A. Yes, sir.

Q. Were those straight skid marks, or what kind were they?

A. They curved.

Q. Would you mind illustrating to the jury here on this model as to how the curves were? Come back this way.

A. The skid marks came out and curved like this—

The Court:

What skid marks?

The Witness:
The skid marks of the truck, this truck and trailer.

The Court:
Well, let me get that straight. Which is it now?

The Witness:
The skid marks of the tractor pulling the trailer, this truck here.

The Court:
That was how far now?

The Witness:
It was 124 feet. That was the measurement on the left rear wheel of the truck.

The Court:
That was from the place of the accident?

The Witness:
No, sir. That was the skid marks after the point of impact.

The Court:
All right. I just wanted to get it straight in my mind.

Q. Now, you said that was a skid mark. Was that a curved skid mark?
A. Yes, sir; it was curved.
Q. Did you measure the straight way or the curve?
A. I measured it straight from the first skid mark to the left rear wheel of the truck.

Q. Did the skid mark, if you had followed the curve of the skid, been some feet further?

A. State that again.

Q. I say, would the skid mark, if you had followed the curve of the skid, been some feet further?

A. Yes, sir, it would have been a little further.

Q. From the manner of the skid mark on the highway, was that truck skidding straight, or was it skidding side ways?

A. It was kinda of a side way manner.

Q. Will you illustrate to the jury, using this model, as to how that was?

A. It was skidding like this, (indicating on model), and then the truck ended up something like that, with the trailer out on the pavement.

Q. Now, where you have left it there, the front portion of the truck, which is sometimes referred to as the tractor, was out there?

A. Yes, sir.

Q. The front portion of the carrier-all truck was in the ditch?

A. In the ditch, yes, sir.

Q. In the ditch on the right-hand side?

A. That's right, yes, sir.

Q. And the trailer was jack-knifed?

A. Yes, sir.

Q. How was the shoulder of the road? Was that sandy?

A. No, sir, but it was dirt, but you could drive out on it there.

Q. Did this tractor plough through that dirt?

A. Yes, sir, it ploughed some distance through that dirt.

Q. Did you make an estimate as to how far it ploughed in that dirt?

A. No, sir, but I imagine the total distance in the dirt was some eight or ten feet. I didn't measure it.

Q. While you were there, was there an attempt made to pull that tractor back, the truck and trailer, back out of the ditch?

A. Yes, sir.

Q. With a wrecker? Was that attempt made?

A. Yes, sir.

Q. Was the wrecker able to pull it out from that dirt?

A. No, sir.

Q. What was necessary to pull it back out of the dirt in which it had ploughed?

A. Another truck and trailer.

Q. Was the motor of the truck running in the ditch at that time? Were they using it?

A. No, sir. They did not use its force.

Q. It took a trailer and a tractor to pull it back through that dirt through which it had ploughed?

A. Yes, sir, the truck and trailer pulled it back out.

Q. The farm tractor, was it broken into?

A. Yes, sir, it was in three pieces.

Q. Would these be the approximate pieces, the wheel and the front portion and the back portion?

A. Yes, sir, there was a wheel, a front portion and a rear portion.

Q. Will you put these on this model as best you recall where they were?

A. The best I recall they were over in this ditch, and the wheel was laying off the pavement when we got there.

Q. Is that about the manner in which they were?

A. Yes, sir, something about like that.

Q. Did you examine the road way that night, this section of the road way where the accident happened?

A. Yes, sir.

Q. From your examination could you determine any reason why the auto transfer truck could not have turned to the left and safely passed that tractor?

Mr. Sharpe:

If Your Honor please, he was not there for more than an hour after it happened, and there is no basis for that question, no basis has been laid for that question and it would be a conclusion of the witness.

Mr. Highsmith:

We have shown that the road was in the same condition all the time. There was no approaching traffic. I asked him, from the condition of that road that night, at that place, was there anything there, in his opinion, that would have prevented the truck transport turning to the left and passing the farm tractor, which was on the right-hand side of the highway.

The Court:

Well, with that wording I will admit it.

Q. Was there anything?

A. No, sir, there was nothing there.

Q. Would you examine an exhibit of what purports to be a portion of U. S. Highway, No. 23, commencing at the Pair residence and going to the Shuman residence toward Hazlehurst? Would you examine that, please?

A. This is Hazlehurst, and this would be the Beck home. I believe this is the Shuman residence here. There was a drive way on down there. Is that a cor-

rect representation of that portion of the road at that point, as you know it?

A. Yes, sir.

Q. Have you travelled that road, going toward Hazlehurst and look up toward Hazlehurst and see if there was anything that would prevent you from seeing ahead of you?

A. Yes, sir.

Q. At any portion of that road, how far ahead of you could you see?

A. I would say 500 feet.

Q. On any portion of that road along there you could see at least 500 feet ahead of you?

A. Yes, sir, you could see 500 feet.

Q. Sergeant, I believe you made a report on this accident?

A. Yes, sir.

Q. On that report you estimate the speed at 45 or 50 miles an hour?

A. Yes, sir.

Q. In making that estimate, did you take into consideration any number of miles that the truck carrier-all would have been slowed down by the impact of the tractor?

A. No, sir, just the skid marks.

Q. Would the impact have slowed the truck carrier-all some?

A. Yes, sir, it would have some, I guess.

Q. Did you take into consideration the fact that the tractor was skidding in a side manner?

A. Well, no, sir.

Q. Would that add some to the speed of your estimate?

A. Well, it could.

Q. Did you take into consideration the portion that skid was through that heavy dirt on the side of the shoulder?

A. Well, no, sir.

Q. Taking those things into consideration, would you say that your estimation of that speed was higher than you put it on that report?

A. Well, it could have been more than that.

Q. How much more, would you say?

A. Well, I don't think it would have varied over five or six miles more than that.

Q. About five or six miles above what you reported? You reported it from 45 to 50?

A. Yes, sir.

Q. So if you add five or six miles it would be 55 or 61? I mean from 51 to 57?

Mr. Sharpe:

That would be for the witness to answer, Your Honor, and not for counsel.

Mr. Highsmith:

He said it would have added five or six miles, and then I asked him the question that considering his report of 45 to 50 miles an hour, that if he added five or six miles would that make it from 51 to 57?

The Court:

That would be just a matter of mathematics. I think you can ask that. Go ahead. Lets get onto something else.

Q. Did you examine the tractor that night?

A. Yes, sir.

Q. Would you say that this picture I exhibit to you, marked Plaintiffs' Exhibit No. 1, looks like the tractor that you saw that night and the position of the lights on the back of the tractor?

A. Yes, sir, it looks similar to that.

Q. I exhibit to you a picture marked Plaintiffs' Exhibit No. three (3), purporting to be a picture of the carrier-all of the Complete Auto Transit Company, would you say that looked like the same or a similar carrier-all?

A. Yes, sir, it is similar to the one that was involved in the accident.

Q. Can you see any difference between that one and the one you saw that night, as far as looking at it is concerned?

A. No, sir.

Mr. Highsmith:

The witness is with you.

Cross Examination.

By Mr. Sharpe:

Q. Mr. Hartsfield, that night you made a very careful examination of all the facts, the physical facts surrounding the accident, didn't you?

A. Yes, sir.

Q. You were in company with another member of the State Patrol?

A. Yes, sir.

Q. You conferred together on it?

A. Yes, sir, we did.

Q. After you had examined all of the physical facts you wrote down, to the best of your judgment, what the speed of the truck was?

A. Yes, sir.

Q. It was your opinion at that time that it was going 45 to 55 miles an hour?

A. Yes, sir.

Q. Is that still your best judgment?

A. Yes, sir.

Q. Likewise, it could have been five miles less, couldn't it?

A. Yes, sir, it could have varied one way or the other.

Q. There was no such evidence of speed there that caused you all to prefer charges against him?

A. No, sir.

Q. Now, Mr. Hartsfield, I would like for you to illustrate something here. First, you understand the operation of a tractor and the braking effect upon a tractor and the trailer part, don't you?

A. Yes, sir.

Q. Now, isn't it true that you actually got in the cab and got it out of this ditch?

A. No, sir.

Q. Who did?

A. Sergeant Hamrick.

Q. Do you have any personal knowledge that the tractor was without steering, that it was impossible to steer it at all?

A. Well, he steered it but the motor was not running.

Q. I mean the steering mechanism?

A. Yes, sir.

Mr. Highsmith:

I didn't get the question or the answer. What was the question and what was the answer?

Mr. Sharpe:

That the steering mechanism of the tractor was entirely out of control.

The Witness:

No, sir. The steering mechanism was working when he pulled the truck out. He guided it out and straightened it back up.

Q. The drive shaft of the truck was down on the ground, wasn't it?

A. Yes, sir.

Q. And it was unable to operate?

A. Yes, sir, that's right.

Q. All right, now when you are going up the road with an outfit similar to this and the brakes that work on the tractor part here, when they are knocked out, what happens?

A. Well, of course, all of your breaking power would be on the truck part of it.

Q. Well, suppose there is just a slight lick on this side here, (let's turn it this way), what happens then? (Indicating on model.)

A. It would cause it to move side ways some.

Q. Well, isn't it true that this load, whatever it may be back here, whether it is 2,000, or 3,000 or 8,000, it takes control of the tractor part, doesn't it?

A. Yes, sir.

Q. It would be pushing?

A. Yes, sir, it would be pushing.

Q. Therefore, in a case where there is a slight lick on the side, this trailer part here pushes the truck on?

A. Yes, sir.

Q. Ordinarily what we call "jack-knifing it"?

A. Yes, sir.

Q. And the driver would have no control in the world over this back part here, would he?

A. No, I don't think so.

Q. And vice versa, if the brakes work on this, they would hold the front part straight, won't they?

A. I think so, yes, sir.

Q. Because it is pulling back?

A. Yes, sir.

Q. And it would cause it to jack-knife and go side ways?

A. Yes, sir.

Q. And the driver would have no control over the operation of this part here?

A. Very little, I would think.

Q. Well, from your examination of the road that night, is that what caused those marks, the drive shaft was down and the back part was pushing the front part forward?

A. The skid marks were of the left rear wheel, the skid marks that I measured.

Q. This is a main highway, isn't it?

A. Yes, sir.

Q. Quite a bit of travel on it?

A. Yes, sir, there is quite a bit of traffic on it.

Q. More than the average?

A. I would think so, yes, sir.

Q. Probably more on that road than any other road in Jeff Davis County?

A. Yes, sir.

Q. Trucks frequent that highway?

A. Yes, sir.

Q. And farm trucks?

A. Well, not like the other traffic.

Q. A lot of cars on that?

A. Yes, sir.

Q. It is a closely patrolled road, isn't it?
A. Yes, sir.

Re-Direct Examination.

By Mr. Highsmith:

Q. Was there any signs on the pavement of the drive shaft or anytting else dragging on the truck?

A. No, sir, there was no signs where the drive shaft was dragging.

Q. You don't know whether the drive shaft broke back here or when it went into the ditch?

A. That's right, no, sir.

Q. There was no signs on the pavements of it having broke prior to going into the ditch?

A. No, sir.

Q. The houses that are located along that road, as shown on this map, and the drive ways at the houses obvious to anybody driving along there?

A. Yes, sir, you can see them.

Mr. Highsmith:
That's all.

The Court:
All right, you can go down.

(Witness excused.)

H. B. HAMRICK, sworn for the plaintiffs, testified:

Direct Examination.

By Mr. Highsmith:

Q. Mr. Hamrick, what position do you occupy with the State of Georgia?

A. Sergeant.

Q. Sergeant in the State Patrol?

A. Yes, sir.

Q. Is it a part of your duties to investigate collisions between motor vehicles on the highways?

A. Yes, sir.

Q. Were you occupying the position of Sergeant in the State Patrol during last July, 1955?

A. Yes, sir.

Q. Do you remember the occasion when you were called to investigate an accident and collision that occurred on U. S. Highway No. 23 just south of the city limits of Hazlehurst between an automobile carrier-all of the Complete Transit Company and a farm tractor driven by Deroy Floyd?

A. Yes, sir.

Q. Who did you go out there with?

A. Trooper Hartsfield and myself went out there to investigate the accident.

Q. Did you or he make the measurements?

A. Trooper Hartsfield made the measurements.

Q. Did you direct traffic while it was going on?

A. Yes, sir.

Q. Do you have any recollection of those measurements?

A. He has them. I talked to him about it, but he is the one that made the measurements.

Q. You don't know about the measurements?

A. No, sir, nothing but what he told me.

Q. Where did you find the tractor when you went out there?

A. The tractor was off the road, on the righthand side, headed north.

Q. Was it in the ditch at about the same position as that tractor there is? (indicating on model.)

A. Yes, sir.

Q. And broken up in that manner?

A. I know the left rear wheel was broken off.

Q. And the other parts were in the ditch?

A. Yes, sir.

Q. Sergeant, assuming that the farm tractor was on the right-hand side of that road, did you see anything on that highway that night at the time that you were there that would have prevented the truck-carrierall of the Complete Auto Transit from varying to the left and passing the farm tractor?

A. No, sir. He had plenty of room on the other side.

Q. He had plenty of room on the other side to pass?

A. Yes, sir.

Q. Have you been over that road frequently?

A. For the last six years, yes, sir.

Q. Is there any portion on that road, starting at the Pair residence and going on toward Hazlehurst to the Shuman residence, is there any place that you can see ahead of you less than 500 feet?

A. What place is that now?

Q. Starting at this place here, beyond the Floyd residence, where now there is a skating rink?

A. Yes, sir.

Q. Coming on this way toward Hazlehurst, is there any place on that portion of that highway that you can not see at least 500 feet ahead of you?

A. I don't believe there is, no, sir.

Q. Assuming that Deroy Floyd left with his tractor, starting here, and was proceeding between ten and fifteen miles an hour, and the Complete Auto Transit truck coming back of it at a speed of between 45 and 55 miles per hour, is it your opinion that he would have had an unobstructed view of that farmall tractor most of that way?

Mr. Sharpe:

If the Court please, we object to that question for the reason that it may be possible for one person, under advanced psychology, to look into the mind of another and determine what they know or what they would do under given circumstances, but such is now not the law.

The Court:

He didn't ask him that. He didn't ask him anything about psychology. He asked him—assuming they were coming down the highway that way, what the plaintiffs contend he could see—I think that is admissible.

Q. Anything, in your opinion, to prevent him from seeing it?

A. No, sir.

Q. Would you state whether or not, in your opinion, if he was looking he could have seen it all the way down, if there was a light back here on the tractor?

A. He should have seen it 500 feet or more.

Q. Before he reached it?

A. Yes, sir.

The Court:
On second thought, what do you say to that, Mr. Highsmith?

Mr. Highsmith:
Your Honor, I didn't ask him any question of psychology. I didn't understand the statement the Court had made.

Mr. Sharpe:
I have got the authority right here, Your Honor.

The Court:
Lets get that. I don't want to get anything illegal in this case from either side.

Mr. Highsmith:
I didn't qualify him as an expert on Psychology.

The Court:
That's all right, lets get the law on it.

Mr. Sharpe:
All right, sir. This is the case of Northwestern University Vs Crisp, Georgia Law Report of July 29, 1955, page, in a case that was tried in Americus, Georgia: In the future of advancing psychology it may become possible for one person look into the mind of another and testify what the latter knows. But at present the law treats such statements as conclusions, not facts." It cites the case of Slaughter Vs Heath, 127 Ga. Page 747, Headnote 7.

The Court:

I don't think that is the question here. Mr. Highsmith asked him "assuming". He said assuming those were the facts, if those were the facts, could he have done so and so.

Mr. Highsmith:

I said assuming that those were the facts, that the tractor was proceeding at that rate of speed, what distance should anybody back of him have been able to see him.

The Court:

You are familiar with that road, are you, Sergeant?

The Witness:

Yes, sir.

The Court:

I will admit it. You may proceed.

Mr. Highsmith:

The witness is with you.

Cross Examination.

By Mr. Sharpe:

Q. Sergeant, let us also assume that the distance between the braces on a super-farmall tractor are nineteen inches apart—does that look like a super-farmall tractor?

A. I am not familiar with those. That looks like a farmall. I don't know whether it is a Super, or what it is.

Q. Does it look like the tractor that was involved in that accident?

A. As I said to start with, I didn't get close to the tractor, the wrecked tractor. I was handling traffic.

Q. O. K., Lets assume that it is 19 inches between this bar here and this one here. Now a lady of normal height and normal weight is standing mid-way, or to the right or left, with a dress on, with her arms on her husband's shoulders, obscuring this light—they wouldn't be likely to see it either, would they?

A. If she was standing directly behind it, he wouldn't.

Q. O. K. You notice from this tractor here that the left front light is not visible at all from the rear? It is immediately behind the tire?

A. Lets see. I don't even see it.

Q. It doesn't even show on there, does it?

Mr. Highsmith:

Your Honor, may I make one observation or objection to that question? He has a picture here, which has been identified as the same tractor that shows the light four or five inches further to the left than that picture he is asking about.

The Court:

Well, you will have the witness back on examination, if you want to. He is on cross now. Go ahead, Mr. Sharpe.

Q. You can't even see the front light on this one, can you?

A. I don't see it.

Q. You also observe that the motor on this kind of a tractor sits to the left and not in the center of the wheel?

A. That's right.

Q. All right, you also observe that the driver sits to the right of the motor, looking down the side of the motor?

A. That's the seat there.

Q. O. K. Now, assuming that she was standing right here, behind this seat, and this light, on the righthand side, is immediately in front of that seat with her dress obscuring it would be impossible to see that light, too, wouldn't it?

A. If she was directly behind it, sure.

Q. Well, the allegations in this petition are that she was standing behind her husband with her arms on his shoulders, with her head on his right shoulder, and that would obsecure it if that is a true representation of it, wouldn't it?

A. You mean obscure the headlight?

Q. Yes, sir?

A. I suppose so, yes, sir.

Q. Did you examine that tractor?

A. No, sir.

Q. You didn't see this one?

A. I saw it off at a distance. I didn't go up close to it. I was on the road way.

Q. You would be unable to identify either one of these other pictures of that tractor?

A. That's right. All I knew it was a farmall tractor with the left wheel off it.

Q. You, along with Mr Hartsfield, made a careful examination of the scene of the wreck, didn't you?

A. Yes, sir.

Q. Did you look at all the facts surrounding it?

A. Segt. Hartsfield was talking to the two drivers and I was handling the traffic because the truck was cross ways the road.

Q. Did you make a personal observation of it?
A. I did, after we got the traffic cleared, I did look around.
Q. Did you see any indication of a violation of the law on the part of this truck driver?
A. Well, I didn't make a case.

Mr. Highsmith:
Your Honor, I object to that question unless he shows first—

The Court:
Well, I think he answered it. He said he didn't make a case.

Q. Did you talk to the driver yourself?
A. No, sir. Trooper Hartsfield talked to the driver after we got the truck into town.

Mr. Sharpe:
That's all.

Re-Direct Examination.

By Mr. Highsmith:
Q. On the question of law, there is a law in the state of Georgia that provides that one vehicle approaching another shall pass—

Mr. Sharpe:
—if the Court please, he is not the law.

The Court:
Well, I don't think either one of you are permitted to ask this witness what the law is. I am presumed to say what the law of this case is.

Mr. Highsmith:
I was replying to Mr. Sharpe's question when he asked him did he violate any law.

The Court:
Well, I rule out any questions of law to this witness.

Q. Sergeant, from the statements of the driver, did the driver of the Complete Auto Transit truck pass to the left and around this farmall tractor, or did he hit it?
A. He hit it and passed to the left.
Q. After he hit it?
A. Yes, sir.

The Court:
He is going by the signs on the road, is that right?

Mr. Highsmith:
He said from the statements of the driver of the truck.

The Court:
All right.

The Witness:
Trooper Hartsfield was the one that was talking to the driver.

The Court:
Did you hear either one of them make a statement?

The Witness:
Either one of the drivers say what?

The Court:

Did you hear either one of the drivers make a statement that he could have passed him, that Mr. Highsmith asked you about?

Mr. Highsmith:

No, I asked him did he admit hitting him without passing him.

The Court:

Well, did he admit that to you?

The Witness:

He said he hit the tractor, when Trooper Hartsfield asked him.

Q. Was there just one driver in that truck, or more than one?

A. He stated that there was only one person in the truck.

Q. Only one p rson in the truck?

A. Yes, sir.

Mr. Sharpe:

If the Court please, we admit that in our answer.

Mr. Highsmith:

He don't say whether there was one driver or more than one driver, because sometimes they have an assistant driver.

Mr. Sharpe:

One driver.

The Court:
All right.

Q. Did he make a statement in your hearing, the Complete Auto Transit truck driver, as to whether or not there was any traffic approaching at the time he approached the farmall tractor?

A. I didn't hear him say that.

Q. You didn't hear him say that?

A. No, sir.

Q. I exhibit to you a picture marked by the defendant as "D-1", purporting to be a picture of the tractor in question, with a broken down wheel, will you note the position of the rear light on that?

A. Yes, sir.

Q. With relation as to how far it is to the left?

A. Yes, sir.

Q. I also exhibit to you a picture marked Defendant's "D-4", taken of a tractor not involved in the accident about which you were examined. Is the rear light on that tractor further to the right by some five or six inches?

A. They don't look like they are in the same position. This picture here shows a light under the seat, and this picture here shows a light to the left.

Q. The small picture and the one that purports to be of the tractor involved in the accident shows the light to the left of the seat?

A. Yes, sir.

Q. It is the one that shows the light to the left of the seat?

A. Yes, sir.

Q. The other picture shows—

Mr. Sharpe:

Your Honor, I have been practicing law a long time, and I don't believe I have seen such leading of the witness.

The Court:

Yes, that is leading, Mr. Highsmith. I sustain the objection.

Mr. Highsmith:

That's all.

The Court:

All right, you may go down.

(Witness excused.)

Mr. Highsmith:

We now have the depositions of Dr. B. Goldman that we would like to read into the record, if Your Honor pleases, read to the jury at this time.

The Court:

All right.

Note: At this point the depositions of Dr. B. Goldman were read to the jury on behalf of the plaintiffs as follows on the next page.

DR. BENJAMIN GOLDMAN, by the way of Deposition, testified for the plaintiffs, as follows:

Direct Examination.

Q. Will you please hold up your right hand? Do you solemnly swear to tell the truth, the whole truth and nothing but the truth and that the statements you are about to make are true and correct, so help you God?

A. I do.

Q. Will you please state your name?

A. Dr. B. Goldman.

Q. Are you a practicing physician?

A. Yes.

Q. Where do you practice medicine?

A. In Hazlehurst, Georgia.

Q. How long have you been in the practice of general medicine?

A. Since 1937.

Q. Do you operate a hospital in Hazlehurst?

A. I do.

Q. Did you know Mrs. Mamie M. Floyd during her life?

A. Yes.

Q. Is she living or dead?

A. She is dead.

Q. Was she admitted to your hospital on the night of July 27, 1955, as a patient?

A. Yes.

Q. What was her complaint at that time?

A. She had a laceration on the head and she was conscious at the time of admittance.

Q. From her history given at that time, do you think that she had been in a collision shortly before her admittance?

A. Yes. She was brought in and I understand that she was hit by a transfer truck. She was on the back of a tractor and in the collision she hit the pavement.

Q. Are these facts stated from the history of her case?

A. Yes. That is right.

Mr. Sharpe:

If Your Honor please, we object to that about her history of her case. That would be hearsay. The doctor wasn't there when it happened.

The Court:

What is that?

Mr. Sharpe:

From her history given at the time, that she had been in an automobile wreck. We say—

The Court:

Yes, I will exclude that.

Q. How long did she remain in your hospital?

A. On the 7/27/55 she was admitted at 9:30 P.M. and was dismissed on 7/29/55 at 8:30 P. M. She was dismissed and sent to Augusta by ambulance at 8:30 on July 29.

Q. What was her condition when you sent her to the hospital in Augusta?

A. She was unconscious when she left the hospital that evening.

Q. Assuming that she died on August 2, what, in your opinion, was the cause of her death?

A. In my opinion she died of an internal hemmorrhage caused by the accident.

Q. It is your opinion that she died by reason of injuries received in this accident?

A. Yes.

Q. Is this opinion based on your knowledge of her while at your hospital and at the time she left the hospital?

A. Yes.

Mr. Sharpe:

We object to that, Your Honor, and move to exclude it. She didn't die in his hospital.

Mr. Highsmith:

This is an expert witness, Your Honor.

The Court:

He said she could have died from it.

Mr. Highsmith:

He said in his opinion she died. He said in his opinion she died from the condition she was in at the time she left his hospital, and this is an expert witness and he said in his opinion she died.

Mr. Sharpe:

There is a case of Atlantic Coast Line vs. Marshall, just decided last week, in which the Court said this: "Any statement made to physician, which includes statements made by the plaintiff usually as to pain and suffering the statements not being involuntary expressions as to pain and suffering and not in response to manipulation or manual examination or treatment and opinions based upon statements are purely hearsay."

The Court:

Well, he didn't say anything about what he heard. He said in his opinion, as I understand, when she left his hospital. Read that over again.

Mr. Highsmith:

"What was her condition when you sent her to the hospital in Augusta?" She was unconscious when she left the hospital that evening." Assuming that she died on August 2, what, in your opinion, was the cause of her death? In my opinion she died of an internal hemorrhage caused by the accident."

The Court:

Well, she might have had a wreck on the way to Augusta.

Mr. Highsmith:

It is just his expert opinion based on her condition at the time she left his hospital.

The Court:

Well, that is pretty doubtful. He is just assuming that from the condition she was in when she left his hospital.

Mr. Highsmith:

Well, he goes on and says: "Is it your opinion that she died by reason of the injuries she received in this accident? Yes. Question: "Is this opinion based on your knowledge of her while at your hospital and at the time she left the hospital? Yes."

The Court:

All right, I will admit it.

Mr. Highsmith:

This is cross examination from here on. Do you want me to read it?

Mr. Layne:

Yes. That's all right.

Cross Examination.

Q. Were you in Augusta at the hospital while Mrs. Floyd was there?

A. No.

Q. She died several days after she had left here?

A. Yes.

Q. How many days?

A. I do not know the exact date of her death but I have some correspondence from the doctor who took care of her while she was there.

Q. If she left here on July 29 and died August 2 the that would be about four days after you had seen her?

A. That is right.

Q. Is it true that other things could have happened to her contributing to her death?

A. No. She left here with the idea that she had some internal bleeding of the brain. She was kept here for observation. We felt she had a concussion. We usually keep them for observation for about a week and if nothing happens we assume they are all right. While here she developed symptoms of internal bleeding of the head and I decided she should be seen by a neuro-surgeon with th idea that if there was internal bleeding it would be possible to do a trephinning. They can and do an exploratory with the tre-

phine for the purpose of removing the clot if they can get to it, which they did.

Q. Do you know of your own knowledge that they did?

A. Yes. I have a letter from the doctor that saw her stating that they did.

Mr. Sharpe:

If Your Honor please, we are right back at the same place.

The Court:

No, this is altogether different. Who is doing that examining of the witness?

Mr. Highsmith:

This is cross examination. It is the attorney for the defendant, but I have no objection to it being struck out.

The Court:

All right, leave that out then.

Mr. Highsmith:

I entered an objection at the time to the effect: "Let's confine our statements to those of your own knowledge."

Q. Were you Mrs. Floyd's family physician?

A. No.

Q. Had you treated her anytime previously?

A. Not recently.

Q. Do you know Dr. Walters in Augusta?

A. No, other than correspondence I had with him.

The Court:

In other words, gentlemen, you understand that any information he received from this doctor in Augusta by the way of letters or correspondence is inadmissible, because it would be hearsay.

Q. Did you refer her to Dr. Walters?

A. No. I referred her to the Neuro Service in Augusta.

Q. Do you know anything about Mrs. Floyd's blood pressure before the accident?

A. Nothing, other than hearsay.

Q. Did you send any records with her?

A. No. I talked to the Resident of the Neuro Service to get her admitted.

Q. I hand you this pink sheet of paper and ask if you can tell me what it is?

Mr. Highsmith:

Your Honor, I move to strike what is on this piece of paper. However, I have no objection to letting it go in.

The Court:

What do you say about it?

Mr. Sharpe:

He is the one objecting to it, Your Honor.

Mr. Highsmith:

I withdraw my objection.

The Court:

All right.

A. This is a death certificate.

Q. The bottom of the paper says "certified copy"?

A. Yes.

Q. Whose death certificate is it?

A. Mamie Floyd's.

Q. What does it show as the cause of her death?

A. Hypertension and head injury.

Q. In a case of high blood pressure, what effect does hypertension have on a person, say someone who had no injury? How does hypertension effect a person who had not been injured in an accident?

A. Some people do not even know they have it; others know it only when they have their blood pressure taken. Other people may be extremely nervous and have headaches.

Q. What effect does hypertension have on a person with an injury such as Mrs. Floyd's?

A. The blood pressure may be stationary or go up a little bit.

Q. Does hypertension increase the flow of blood, such as the hemorrhage that you speak of?

A. Not necessarily. It all depends on what has happened. Are you trying to find out if the blood pressure in this case would go up because of the accident?

Q. Does the fact that she had hypertension make her condition more dangerous than if she had not had it?

A. No, for this reason; unless there is a break in the blood vessel, there is no increased bleeding.

Q. There is increased bleeding when a blood vessel breaks?

A. Yes.

Q. She died from a break in a blood vessel?

A. Yes, from an intra cerebral hemorrhage on the right side which bled into the right lateral ventricle.

Q. Then would you not say that with this hypertension she would bleed more freely?

A. No. It would not make any difference if there is a leak in a blood vessel.

Q. Would high blood pressure make it bleed any faster?

A. No. In brain injuries if there is a break in a blood vessel, it oozes and oozes until symptoms appear which show a pressure, which is the case these two days she was in the hospital here for observation and nothing apparently showed up until the second day. A similar case without high blood pressure, that could happen too. Any skull injury would not have anything to do with blood pressure itself.

Q. Do you think her condition was more dangerous with hypertension than if she had not had it?

A. I cannot answer that because we have deaths with normal people. I realize that a person could be normal, either with or without being injured, with hypertension.

Q. Isn't it more dangerous than if that same person were normal?

A. I don't think so. I think anybody getting a head injury and a blow hard enough, there would be an eruption in a blood vessel in the brain.

Q. Would you consider a person with hypertension being in good health?

A. No.

Mr. Sharpe:

Now, if the Court please, I would like to make this observation. Now, here is a patient of Dr. Goldman,

whom he did not send to this doctor in Augusta. He sent her to a neuro-surgeon, according to his testimony, and here is a doctor whom Dr. Goldman doesn't even know about, with whom he has never talked, and with him he had no confidential relations, and to whom he had never sent a patient to before, and this doctor voluntarily writes him some information and based upon all of this hearsay—

The Court:

I thought you all agreed for that testimony to go in. I was going to rule it out, and you all said no, that you agreed for it to go in. I thought you agreed to it.

Mr. Sharpe:

It was the cause of death that was ruled out.

The Court:

Well, I thought you all agreed to it.

Mr. Highsmith:

I said I had no objection to it going in and Mr. Sharpe said he wanted it to go in.

The Court:

Then why are you objecting to it now?

Mr. Sharpe:

Well, Your Honor, if we accept that version of it the lady died from hypertension and not from this injury.

The Court:

Well, that would be a question of fact for the jury as to whether she died from high blood pressure or from this injury, or just what she did die from. That is all a question of fact for the jury.

Mr. Sharpe:

Well, suppose that ambulance had wrecked between Hazlehurst and Augusta?

The Court:

That was what I said, and you all said you would waive all of that.

Mr. Sharpe:

No, I didn't say that, Your Honor. That was Mr. Highsmith.

Mr. Highsmith:

We will connect that up, Your Honor, and show that she was safely taken to Augusta, and that somebody was with her at all times.

The Court:

All right. Now, what is your motion, Mr. Sharpe?

Mr. Sharpe:

Your Honor, I move to exclude all the testimony of this doctor, because he don't know anything about it except that she said she was in an automobile wreck.

The Court:

Well, I don't think I would be justified in ruling out all of his testimony. He examined the lady and diagnosed her case.

Mr. Sharpe:

Well, I say everything that happened after she left his hospital.

The Court:
Well, gentlemen of the jury, just disregard all the testimony of Dr. Goldman that he did not know of his own knowledge. Is that sufficient, Mr. Sharpe?

Mr. Sharpe:
Yes, sir.

The Court:
All right, call your next witness.

DEROY FLOYD, sworn for the plaintiffs, testified:

Direct Examination.

By Mr. Highsmith:
Q. State your name, please?
A. Reroy Floyd.
Q. Mr. Floyd, where do you live?
A. At Douglas, Georgia, at the present time.
Q. Are you the husband of Mamie Floyd deceased?
A. Yes, sir.
Q. Are you one of the plaintiffs in this action?
A. Yes, sir.
Q. Mr. Floyd, I exhibit to you a picture, marked D-1, purporting to show a tractor with a wheel off and with the light to the far left-hand side. So far as you can tell is that tractor which was involved in the accident in question here?
A. It looks like it.
Q. In your opinion, is that the same tractor?
A. Yes, sir.

Mr. Highsmith:
We tender in evidence D-1.

The Court:
Any objection, Mr. Sharpe?

Mr. Sharpe:
No, sir.

The Court:
It is admitted without objection.

Mr. Highsmith:
Change that to P-2.

Q. I exhibit to you, Mr. Floyd, what purports to be a tractor wheel with a bent inside rim. Would you state what that wheel came off of? Is that the wheel that came off that tractor?

A. Well, Colonel, it looks like it.

Q. Well, in your opinion, is it or not?

A. Yes, sir, it was bent.

Q. Was yours bent like that?

A. Yes, sir.

Q. Well, in your opinion, is that the tractor wheel?

A. Well, you know when you take a tire off anything it makes a lot of difference, but it does look like the wheel.

Q. Well, in your opinion, is it the wheel, or not?

A. In my opinion, it is.

Mr. Highsmith:
We tender this one in evidence.

Mr. Sharpe:
No objection.

The Court:
It is admitted without objection.

Q. I exhibit to you, Mr. Floyd, a picture, which purports to be a picture of a tractor broken down, with the bar on the ground beside it and lying on the ground here and a light on the left. In your opinion, is that a correct picture of the tractor on which you were riding at the time of the collision?

A. Yes, sir. It is.

Mr. Highsmith:

We tender this picture.

Mr. Sharpe:

No objection.

The Court:

It is admitted without objection.

Q. On the night of the collision, did you see later, during the night, did you see the Complete Auto Transit Carrier that hit you?

A. Yes, sir.

Q. In your opinion, is there any difference between the looks of the one shown in the picture and the one that hit you, so far as you can tell?

A. Well, it looks just like the same truck, but I couldn't say that it was. It looks like the same truck.

Q. Well, does it look like the same one?

A. Yes, sir, the same kind of truck.

Mr. Highsmith:

We tender this picture in evidence.

Mr. Sharpe:

We object to this one, Your Honor. It has been developed that this is not the one involved in the accident.

Mr. Highsmith:

We do not contend that it is. We introduce it for the same reason he introduced this one, that it was one of similar type, that it looked like the same one.

The Court:

He doesn't tender it as the same one, but one of similar type, is that right, Mr. Highsmith?

Mr. Highsmith:

No, sir, we don't contend that it is the same one, but one like it.

The Court:

All right.

Mr. Sharpe:

If Your Honor please, I wish the Court would withhold judgment on this one. This is a foot different and—

The Court:

He just said it looked like it. Mr. Highsmith stated that he was not introducing it as the same truck but as a similar one.

The Court:

I will admit it.

Mr. Highsmith:

This will be P-5.

The Court:

Do you object to that, Mr. Sharpe?

Mr. Sharpe:
Yes, sir.

The Court:
Well, I will admit it, subject to your cross examination.

Mr. Sharpe:
Now, that one there, if the Court please, I don't think that should go to the jury at this time.

The Court:
Yes, the jury can look at the ones I have admitted without objection, but hold that one for the time being.

Mr. Highsmith:
We now tender in evidence, as P-6, a view of this section of the highway, taken from here, identified by Mr. Johnson—or Mr. Thompson.

Mr. Sharpe:
No objection.

The Court:
It is admitted without objection.

Mr. Highsmith:
I tender in evidence this map that has been identified as plaintiffs' Exhibit No. 7.

Mr. Sharpe:
I have no objection to that.

The Court:
It is admitted without objection.

Q. My Floyd, who did you marry?

A. Mamie Nally.

Q. When did you marry?

A. In 1929.

Q. How many children were borned of the marriage of you and Mamie Floyd?

A. Well, there were twelve in all. There are ten living.

Q. Give your oldest one's name and age?

A. Frances, 25. Irene, 23. W. D., 21. Robby Roy, 18. Bobby Gene, 15. David Earl, 13. James Price, 11. Hazel, 9. J. E., 7. Jo Ann, 4.

Q Is Jo Ann your youngest living child?

A. Yes, sir.

Q. The two children borne after that, did they die in infancy?

A. Yes, sir.

Q. They were twins?

A. Yes, sir.

Q. The children that you named, as living children, were they all living at the time of your wife's death on August 2nd, 1955?

A. Yes, sir.

Q. Mr. Floyd, what have you done to earn a living?

A. Well, mostly farm work, on shares.

Q. What did your wife do?

A. Well, she worked—well, we call it the slip factory at Hazlehurst.

Q. How long had she been working there prior to her death?

A. She started there in June of 1949.

Q. Well, before that, before she started working there, what did she do about the house and for the children?

A. Well, she did the house work and helped me on the farm.

Q. What did the house work consist of, just generally?

A. Making beds, cooking, washing and ironing, patching, mopping and yard sweeping.

Q. Did she take care of the children?

A. Yes, sir.

Q. Did you have an extra nurse for the children, or did she do the nursing?

A. No, sir; we didn't have any nurse.

Q. When the children were sick at night, who got up with them?

A. She did.

Q. Did she nurse them while they were sick?

A. Yes, sir.

Q. Did she get them ready for school?

A. Yes, sir.

Q. Did she do all the things that a mother of children do?

A. Yes, sir, I would say so, yes, sir.

Q. In addition to that, did she help you with your farm work?

A. Yes, sir.

Q. You were generally a tenant on the farm? Did you own a farm?

A. No, sir, I was a share cropper.

Q. You were a share cropper?

A. Yes, sir.

Q. In addition to the time she worked at the slip factory, did she do part of the farm work with you?

A. Yes, sir. She was always right there to help me do anything that I done.

Q. What did she do?

A. Well, she would hoe or plough, or do anything that became necessary to help me.

Q. Now, how did it happen she taken a job at the slip factory?

A. Well, there were so many of us it just looked like we couldn't make it on the farm on shares, and it was pretty small too, and she just had to get out and sorta help me meet the grocery bill.

Q. How much was she earning at that time?

A. Well, when she first started it wasn't but $15.00 a week, but shortly after she started she went up to 75 cents an hour, which made her $30.00 a week.

Q. Was that she got when she first started what is called learner's pay?

A. I guess so. I guess that was the reason they did not pay any more.

Q. And what time did she go to work in the morning?

A. Eight o'clock.

Q. Before going to work, who got the breakfast for the family?

A. She did.

Q. Who got the youngest children ready for school?

A. She did.

Q. She worked until when?

A. 4:30.

Q. Until about 4:30?

A. Yes, sir.

Q. After she came home, what did she do, Mr. Floyd?

A. Well, a lot of times she would put out her washing in the afternoon after she got home. In fact, there was always something that she could find to do, such as making shirts or little dresses and go out in the garden and get her some stuff.

Q. At the time of her death, how many of the children were living at home with you?

A. There were six at home with me.

Q. One of the boys was in the service?
A. Yes, sir.
Q. Which one was that?
A. Robby.
Q. He was gone to the Army?
A. Yes, sir.
Q. How long had he been gone?
A. He left in June.
Q. Before her death in August?
A. Yes, sir.
Q. One of your daughters were married?
A. Two of them.
Q. Did one of them have a child at the time of her mother's death?
A. Well, they both had children, a boy and a girl.
Q. After she came home in the afternoon, who got supper?
A. She did.
Q. Did she get the supper ready for the family?
A. Yes, sir.
Q. Who got the younger children ready for bed?
A. She did.
Q. She did that even during the time she was working?
A. Yes, sir.
Q. Sometime, during that time, did she do any work for you on the farm?
A. Yes, sir, the day that we put in tobacco, or anything like that, if we were not through when she got in, why, she would help. We tried to put it in on Saturday, so she could help us.
Q. Did she have a day off from the slip factory on Saturday?
A. Yes, sir.
Q. She did the house work and helped with the farm work too?

A. Yes, sir.

Q. Mr. Floyd, the day that this collision occurred that night, did she work that day in the slip factory?

A. Yes, sir.

Q. Had she been working regularly prior to that time?

A. Yes, sir. In other words, they did not have work for them the whole time. Sometimes one would be laid off maybe for two or three days.

Q. When she had work, did she work?

A. Yes, sir.

Q. Was she off anytime on account of her sickness?

A. No, sir.

Q. The twins that died in infancy, what year were they borne?

A. I tell you, I know all of their ages, but—

Q. —Was it about 1952?

A. Irene, that's my daughter, she can tell you.

Q. Was it about a couple of years after Jo Ann?

A. No, sir, it wasn't two years.

Q. Was that the last time that she had to miss work?

A. Yes, sir.

Q. She was out about how long?

A. Oh, I would say four or five weeks, something like that.

Q. Mr. Floyd, on the day of July 27th, 1955, where were you all living then?

A. We were living on the Carter place?

Q. Was that known as the "Chick" Carter place?

A. Yes, sir.

Q Is that the house shown here on the map, prepared by C. E. Harrington, as being on the west side of the highway?

A. Yes, sir.

Q. Is that about the place there?

A. Yes, sir.

Q. At that time was any relative of your wife in the hospital?

A. Her brother.

Q. Where?

A. Dublin, Georgia.

Q. That day, did anything happen so far as her brother was concerned?

A. Well, he was operated on and she was anxious to hear from him.

Q. On this night, did you get on your tractor to go somewhere?

A. We got on the tractor and were going to Davis Service Station, this side of town—well, I say this side, in other words between the railroad and my house.

Q. Was that the nearest telephone?

A. Yes, sir.

Q. You didn't have a telephone at your house?

A. No, sir.

Q. Did you own an automobile?

A. No, sir; I didn't.

Q. You didn't own one yourself?

A. Not personally, no, sir.

Q. Did your son own one at that time?

A. Yes, sir.

Q. Was it there at that time?

A. No, sir, he was gone.

Q. Did you have any means of transportation to take your wife to the telephone, other than your farm-all tractor?

A. No, sir.

Q. What year model was that?

A. 1950.

Q. Was it a Super A, Farmall Tractor?

A. Yes, sir.

Q. Did it have lights on the front?

A. Yes, sir.

Q. Did it have a light on the back?

A. Yes, sir.

Q. Were they all burning?

A. Yes, sir.

Q. On this night that you drove out of your drive way and started toward Hazlehurst were you going somewhat northwest on the highway? Did you drive out toward Hazlehurst on the Alma-Hazlehurst Highway?

A. Yes, sir.

Q. Driving down that highway, which side of the highway were you driving?

A. On the right-hand side.

Q. At about what speed were you going?

A. Well, you know a tractor won't go very fast, but I would say it was between 9 and 13 miles an hour, or something like that.

Q. You didn't have it quite open?

A. No, sir.

Q. You were going between 9 and 13 miles an hour?

A. About that, yes, sir.

Q. Was the tractor going as fast as it would go?

A. It could go a little bit faster.

Q. Did any car pass you just after you had gotten on the highway?

A. Yes, sir, just a little ways after I turned off a car came by.

Q. Did it pass you going toward Hazlehurst?

A. Yes, sir.

Q. And did anyone pass you going toward Alma?

A. Yes, sir. These cars met. It was a car and a truck. They met just about as far the other side of me as the far side of the building over there. I wasn't paying any particular attention.

Q. Was that about 100 feet after you got out of your drive way going toward Hazlehurst?

A. Something like that.

Q. Did you see any other traffic pass you, going in the same direction you were, or pass you going back toward Alma?

A. No, sir, those were the only vehicles at all.

Q. Then as you drove along the highway, going toward Hazlehurst, did anything happen to you?

A. Yes, sir.

Q. What happened?

A. A big truck hit my tractor.

Q. Just prior to being hit by the big truck, had you drive your tractor further to the right or not?

A. Yes, sir; I did.

Q. Will you explain to the Court and jury why you drove your tractor further to the right?

A. My wife, all the time, when she and I—

Q. —well, don't go into all of that. Just say why you did?

Q. She said "yonder comes one of those big trucks."

Q. She said 'yonder comes one of those big trucks"?

A. Yes, sir.

Q. And you cut further to the right?

A. Yes, sir, gradually.

Q. What, if anything, was the next thing you knew?

A. Well, the next thing I knew was when that thing hit me, and I was across—well, I felt a spray of water.

Q. Where did the water come from?

A. It came from the tire where that big truck hit it.

Q. Were you carrying water in your tractor tires?

A. Yes, sir.

Q. And when it busted that tire you felt that water?

A. Yes, sir. You know, just a spray.

Q. Where were you with respect to the highway after you were hit? Were you hit?

A. I was in the ditch.

Q. Was your tractor still whole, or was it broken into?

A. It was broken into and one wheel was off.

Q. Were your front lights burning?

A. Yes, sir.

Q. As you proceeded down the highway was your back light burning?

A. Yes, sir.

Q. And where was your wife standing?

A. She was standing on the draw bar behind me.

Q. Had she ridden there before?

A. Yes, sir.

Q. When she was riding that way, what did she do on this night with respect to holding her dress to keep it from blowing?

A. Well, she always, day or night, when she got on the tractor, she held her dress like that, with her left hand.

Q. I show you what purports to be a woman's dress and ask you whose dress that is?

A. That's Mamie's.

Q. Is that the dress she had on that particular night?

A. Yes, sir.

Q. What size woman was Mamie?

A. Well, I would say about 130 or 135 lbs. She was not a large woman.

Q. I exhibit you a picture. Who is that a picture of?

A. That's Mamie.

Q. About how long before her death was that taken?

A. About—you know, I didn't think anything like this would come up.

Q. Approximately, Mr. Floyd?

A. I would say a year and a half.

Q. Was she about the same size and all at the time of her death as she was in this picture?

A. Yes, sir.

Q. Any difference in her size?

A. Not as I could tell, no, sir.

Q. Is this the only picture you have of her?

A. Yes, sir.

Q. The next thing you knew, after hitting the ditch, was a spray of water?

A. Yes, sir.

Q. Then what did you do?

A. Well, I jumped off the truck and ran to the road and hollowed for help three times and then I run to her and tried to pick her up.

Q. Would you kind showing the jury where she was and where the tractor was? Does this here represent your wife, Mamie? We will put it about there, and this is the tractor here. Is that about the way she was to your best recollection? (indicating on model.)

A. The biggest thing I was interested in was getting her up and having something done for her. I didn't pay too much attention to all of this, but my best recollection is she was laying about like the white line there in the road. She might have been closer to the white line.

Q. Was the broken tractor about where it is now on the model over in the right-hand ditch?

A. Yes, sir.

Q. When you reached her, where was she laying?

A. Well, I would say about the middle of the lane.

Q. Did you lift her up?

A. Yes, sir.

Q. Did anybody help you?

A. Yes, sir.

Q. Who was that?

A. Mrs. Beck, and she told me the boy's name, but I don't remember his name now.

Q. Did you take your wife to Mrs. Beck's house?

A. We taken her to the porch.

Q. Did you call an ambulance?

A. I don't remember, but I believe I said "some of you all call an ambulance."

Q. Did the ambulance come and get her?

A. Yes, sir.

Q. Where was she taken?

A. She was taker to Dr. Goldman's hospital.

Q. Did you stay with her there that night?

A. Yes, sir.

Q. Was she conscious during that night?

A. Yes, sir.

Q. Did she complain of any portion of her body not feeling right?

A. She complained of her arm a lot where she fell on it.

Q. And where else? Did she have any injury?

A. In her head.

Q. What kind of an injury did she have on her head?

A. Well, it was a good size hole. I would say as big as a common size marble.

Q. That was a hole in her head?

A. Yes, sir.

Q. Did she apparently get along fairly well the first day and night in the hospital?

A. Yes, sir.

Q. The afternoon of the next day, did she apparently get some worse?

A. Yes, sir, she seemed to be getting worse that afternoon until about—well, I tell you I don't know exactly what time it was, but it was late in the afternoon.

Q. Did she rub any member of the body?

A. Yes, sir, she would rub this arm.

Q. Which arm was that?

A. Her left arm.

Q. Did that arm get to where she couldn't move it?

A. Yes, sir. It got to where she couldn't move that arm or leg.

Q. On the 29th, did she lose consciousness in the afternoon?

A. Yes, sir.

Q. Semi-consciousness?

A. Yes, sir.

Q. Had you been staying with her all during that time?

A. In and out. I was with her more than anyone else.

Q. Did you stay there at night?

A. Except the second night, I didn't, not all night.

Q. Did any other injury occur to her while she was in the hospital?

A. No, sir.

Q. After she lost consciousness that night, was she taken somewhere else?

A. Yes, sir.

Q. Where to?

A. Augusta, Georgia.

Q. Who went in the ambulance with her?

A. Me and Robert Miles. I don't know that other fellow.

Q. Did you go with her to the hospital in Augusta?

A. Yes, sir.

Q. Did you ride all the way with her in the hospital?

A. Yes, sir.

Q. Did any injury of any kind occur on any portion of her body at any time on the ride to Augusta?

A. No, sir.

Q. In Augusta, who stayed with her in the hospital?

A. She was in a ward, and there was a nurse in there. She wasn't alone. There were a lot of nurses.

Q. Did you stay there with her?

A. I stayed right by her bed side.

Q. She was there for two days?

A. She was there from that Friday until the next Tuesday.

Q. Did she die on the next Tuesday?

A. Yes, sir.

Q. Did she ever gain consciousness after she left Hazlehurst?

A. She never did get to where she could talk.

Q. Did any injury occur to her, any kind of an injury occur to her head or any other portion of her body while she was in the hospital in Augusta?

A. No, sir.

Q. And she died on August 2nd?

A. Yes, sir.

Q. Did any injury occur to her from the time of the collision with this auto-transit truck of the Complete Transit Company up until the time of her death?

A. No, sir.

Q. Had any other injury occurred to her, or did she have any other injury other than the injury she received in the collision between your tractor and this Auto-Carrierall truck of the Complete Auto Transit Company?

A. No, sir.

Q. She received no other injuries of any kind?

A. No, sir.

Q. Mr. Floyd, on that night, at the time you were hit by this truck—would you come place your tractor on here as it was running that night on the highway?

A. The front wheels were about as wide as the back wheels, and naturally this wheel was there.

Q. Were both of your right wheels, Mr. Floyd, on or off the pavement?

A. They were off the pavement.

Q. And how wide was the tractor which you were driving that night?

A. Well, it was supposed to be—

Q. —well, how wide was it, if you know?

A. Four feet from center tire to center tire.

Q. And the tire is about how wide?

A. Between 6 and 10 inches.

Q. Then the tractor was a little bit over four feet wide?

A. Yes, sir.

Q. It is four feet from center of the tire to center of the other tire?

A. Yes, sir.

Q. How long was the tractor?

A. It is about as long again as it is wide.

Q. That makes about eight feet?

A. About eight feet long, I would say.

Q. That was a 1950 Super-A-Tractor?

A. Yes, sir.

Q. From your familiarity with that road and your position on the road that night as you went toward Hazlehurst, was there anything on the road to prevent the automobile carrierall from going to the left and missing your tractor?

A. No, sir.

Q. Was any traffic coming at that time?

A. No, sir.

Q. There was no traffic coming at that time?

A. No, sir.

Q. Mr. Floyd, on this particular night was it normal atmosphere conditions?

A. Yes, sir.

Q. There was no clouds?

A. No, sir.

Q. No fog?

A. No, sir.

Q. Just a normal night?

A. Yes, sir.

Q. Some days ago, did you go out on that road with a tractor and place it in the same spot that your tractor was when it was hit?

A. Yes, sir.

Q. What kind of a tractor was it?

A. Farmall Super-A tractor.

Q. Was it or not the same kind of tractor that you were driving the night you were hit?

A. It was.

Q. Did it have the same kind of light on the back?

A. Yes, sir, a bright light.

Q. The same kind of light as was on your tractor that night when you were hit?

A. Yes, sir.

Q. As far as you could tell were both the same kind of tractors?

A. Yes, sir.

Q. Was that the night that Sheriff Hatton made a test?

A. Yes, sir.

Q. Was the night, as far as you could tell, the same kind of night?

A. Well, it might have been a little bit cloudier that night, because it rained a little the next day.

Q. Did you notice any clouds?

A. No, sir.

Q. It was just a normal night?

A. Yes, sir, just a normal night.

Q. The conditions, as far as you could observe, the same?

A. Yes, sir.

Q. As far as you could tell?

A. Yes, sir.

Q. Which side of the draw bar on the back of the tractor was your wife riding?

A. To the right.

Q. To the right?

A. Yes, sir.

Q. Had you had her to ride on the back of that tractor before?

A. Yes, sir.

Q. Have you ridden back there with somebody else driving?

A. Yes, sir. She and I have rode back there.

Q. Was there room on that draw bar for both of you to ride?

A. Yes, sir.

Q. With her on the right-hand side, would she obscure the light on the left-hand side?

A. No, sir, she wouldn't.

Q. What was her position when she was riding with you on the tractor down the road with respect to her arm?

A. Well, the tractor had a little old fender that run up here. It did not go out over the wheel, but she had this hand on that fender, and the other hand—now, I can't say that she had it down here, because I wasn't looking back at her, but naturally in the day time or any other time she would go to ride—the muffle was off the tractor that tractor I was driving and it made a lots more fuss, and her chin was off and on my shoulder, you know, talking to me.

Q. She was leaning over on your shoulder with her chin where she could talk to you?

A. Yes, sir; right along there. Now, it wasn't on there the whole time, you know.

Q. She was talking to you just about the time the thing hit?

A. Yes, sir, and she said, "yonder comes one of those big trucks", and—

Q. —and she was leaning over to do that?

A. Yes, sir, and she laid her head right back off my shoulder then again.

Q. I exhibit to you a picture of a tractor, marked d-4, purporting to be a Super-A Tractor with the lights toward the right from the left. Is that light in a different position? Is it more to the right than on the tractor on which you were riding?

A. Yes, sir, it is.

Q. That is not in the same position?

A. No, sir. This one that I was driving was further over to the left.

Q. I exhibit to you Plaintiff's Exhibit No. 4, which shows two bars coming down from the lights. Prior to the accident, were those up or in that position?

A. No, sir, they were up.

Q. Would you illustrate with your arms about how they stood?

A. Well, approximately, they stood about like that, and there was two holes in this bar, a rod fastened to it and it went on up there close to the generator, and these levers here work those things up and down, and those two fell down when the tractor broke into.

Q. Those fell down as they are now in that picture?

A. Yes, sir.

Q. But normally they stand up?

A. Yes, sir.

Q. This bar, do you know how many holes it has in it?

A. I don't exactly, but approximately 19.

Q. Were they an inch or more apart?

A. Yes, sir, they are a few inches apart.

Mr. Highsmith:

The witness is with you.

Cross Examination.

By Mr. Sharpe:

Q. Mr. Floyd, do you know Mr. Bernard?

A. I don't believe I do.

Q. He is the man who drove your tractor last year?

A. You mean the one I farmed with last year?

Q. Yes, sir?

A. Yes, sir.

Q. Year before last?

A. I know him.

Q. Who was he?

A. Dave Barnard.

Q. How far did he live from you?

A. Well, I would say he lived two miles this side of Lumber City, at Hazlehurst; seven or eight miles from Lumber City.

Q. Do you know what kind of a car he owned?

A. He didn't own one.

Q. What kind did he drive?

A. He drove an old model Ford. I don't know what kind of a model.

Q. A pickup?

A. No. It was a car, it wasn't one of the biggest ones.

Q. Did you see him the night of the accident?

A. I didn't see him.

Q. Did you meet him?

A. No, sir.

Q. Do you remember passing him in the road?

A. I remember a truck overtaking me, passing me, but I don't know who it was.

Q. Was that after you came out in the road at your house?

A. Yes, sir.

Q. With reference to where the accident happened, how far was it from your house?

A. About half way. It was near about back to my house.

Q. Was it a fourth of the way or a third of the way?

A. I don't believe hardly a fourth of the way.

Q. Was the tractor being operated at that time when this car or truck passed you just like it was at the time of the accident?

A. Yes, sir.

Q. It had the same lights on it?

A. Yes, sir.

Q. And being operated on the same side of the road?

A. Yes, sir.

Q. At approximately the same speed?

A. Yes, sir.

Q. In the same direction?

A. Yes, sir.

Q. On the same colored road?

A. Yes, sir.

Q. With you and your wife on it?

A. Yes, sir.

Q. You have made rather a careful investigation of this tractor, the farmall tractor, since the law suit began, haven't you?

A. What is that?

Q. You have made a careful investigation of this particular tractor and other tractors just like it since this litigation started, haven't you?

A. No, sir. I will tell you about me now. It is just like you or any other man, I guess, in losing a wife like I did, the less you can have to do with anything like that the better I fare.

Q. You have looked this tractor over carefully, haven't you?

A. I haven't seen it since they taken it to the farm equipment place.

Q. Didn't you testify awhile ago that you took another tractor just like it down there for Mr. Hatton to see?

A. I said the same model.

Q. A Super-A Model?

A. Yes, sir.

Q. This was a Super-A that you were driving, wasn't it?

A. That's right.

Q. All right, was that the kind of tractor that you took down there for Mr. Hatton to see? You don't mean to say that is not a Super-A, do you?

A. I won't say it is or isn't, but it looks like a Super-A.

Q. Does that look like the tractor that you were driving that night?

A. Not exactly. I can see some difference in them.

Q. When Mr. Highsmith had you to identify it, didn't you tell him that it was?

A. I sure did not.

Q. You mean to say you didn't tell Mr. Japp Highsmith awhile ago—

Mr. Highsmith:

He answered the question. He said he could tell a difference in it.

The Witness:

Like I said, I wasn't expecting anything like this to happen, and you will have to excuse me for getting to where I can't talk about it. I lost all I had you know. (Witness crying.)

Q. But you did take this tractor down there, didn't you? You took a Super-A tractor down there for Mr. Hatton to look at?

A. Yes.

Q. And you placed it in the same position where you said you were?

A. Yes.

Q. And you had Mr. Hatton to drive up the road, is that correct?

A. I didn't have him to.

Q. Well, who had him to do it?
A. He did.
Q. Well, who asked him to? Somebody did now, Mr. Floyd, who asked him to do it?
A. I don't know.
Q. Oh, now, Mr. Floyd—

Mr. Highsmith:
For the purpose of the record, I did myself.

The Witness:
I just don't remember myself.

Mr. Highsmith:
If Your Honor please, for the purpose of the record, I will stipulate that I did myself.

The Court:
All right.

Q. You did take a tractor down there?
A. Yes, sir.
Q. About how long were you down there on that trip with Mr. Hatton?
A. About how long was I down there?
Q. Yes?
A. I wasn't very long.
Q. How long have you been operating tractors?
A. Oh, I bought one in 1952, I guess. I don't know exactly.
Q. What do you call this thing here on the side of the tractor, where this comes around here?
A. What is that now?
Q. This piece that comes down the side here, where this little three inch band goes around? (Indicating)
A. That thing there?

Q. No, sir. This one right here?

A. Well, that was what I was talking about awhile ago. It is something to keep the dirt from piling back in there. I would call it a fender.

Q. A fender?

A. Yes, sir.

Q. All right. Now, this little rod that goes around the curve—that farmall tractor is the only tractor that's made that has that, isn't it?

A. I don't know.—

Q. A Ford tractor has a straight piece that curves over and over, doesn't it?

A. Well—

Q. And a John Deer pulls from the take off with a hole bored through the middle of it, doesn't it?

A. Judge, is he trying to make me say whether or not I know tractors?

The Court:

Well, just answer whether you do or not. If you know, all right, if you don't, just say so.

The Witness:

Well, I don't know the names of the parts.

The Court:

Well, you will have to answer the questions. If you don't know, you can say you don't know.

The Witness:

All right, sir. I don't know.

Q. Did you have occasion to put a quiter, or any kind of a cultivating unit on the back of this tractor?

A. No, sir, you don't put them on the back.

Q. Well, did you ever pull any harrow on this little pull bar back here?

A. Yes, sir.

Q. How wide is it between these two bars that come down here?

A. Well, Colonel, to be perfectly fair with you, I don't know.

Q. Well, would you give us some idea?

A. I just don't know.

Q. Did you hear this gentlemen testify this morning that it was about 19 or 20 inches?

A. Yes, sir.

Q. Would that be about right?

A. I wouldn't say, because, in fact. I have never had an occasion to measure them.

Q. Well, you drove this tractor all last year. didn't you?

A. Yes, sir.

Q. It is a very narrow space there, isn't it?

A. Well, that seat on there, it is plenty wide. It is this wide or wider.

Q. But the little piece that you stand on, that's very narrow, isn't it?

A. Sir?

Q. The little piece that your wife was standing on back there, it was very narrow, wasn't it?

A. Well, it lacks about that much going to each wheel.

Q. I mean from end to end?

A. Yes, sir. About like that, I guess.

Q. I believe you said that the tractor would be four feet from center of tire to center of tire?

A. That's right.

Q. That would be 48 inches, wouldn't it?

A. Yes, sir.

Q. All right, if this stick here is 36 inches long, would that be the width from the center of the wheel to the center of the wheel?

A. Yes, sir.

Q. That would be about right?

A. Yes, sir, if it is exactly 48 inches from center of tire to center of tire.

Q. All right. These tires on this particular tractor are eight inches across, aren't they?

A. Well, I said awhile ago between six and ten. I really don't know exactly.

Q. All right, then if you take half of this tire and half of this tire, that would leave 42 inches inside the tires? In other words, if you take four inches off this tire, half of this tire, and four inches off half of this tire, that would leave 40 inches from the inside of this wheel to the inside of this wheel?

A. Yes, sir.

Q. Then how far is this fender away from the tire, about four inches?

A. No, sir, I don't think it is quite four inches.

Q. Would three inches be about right?

A. Well, I just wouldn't say. It is between one and five.

Q. Well, would you say it would be about there?

A. Well, that tire is pretty close under there.

Q. What?

A. That tire is pretty close under that little fender there.

Q. Well, let's say two and a half inches, would that be all right?

A. Well, I expect you have seen a lot of tractors.

Q. Well, if you take five off 47 you have—I mean if we take 5 off 42, we have 37 inches, don't we, between the inside of this fender and the inside of this fender?

A. I guess so, yes, sir.

Q. Then there is a piece that comes down on the side of the tractor to hold this piece that your wife was standing on, isn't there?

A. No, sir.

Q. Well, what was that piece that your wife was standing on down here?

A. Do you want me to show you the best I can?

Q. Yes. This is about the same kind of tractor. I am not trying to confuse you.

A. Well, right down—well, just under this axle, you know, the back axle of the tractor, there is a thing there with some large stud bolts in it, two on each one, and this draw bar had a thing like that, and it had one hole through it here, and it had kind of a gap cut out there, and you take this bolt clean out and put it through that hole and leave it loose, and you can work it up and down, and then you put this on, and pull it over and tighten it and it clamps, and there is not anything that comes down from the rest to hold it.

Q. That's right. Isn't that a piece of cast iron that's a little bit bigger than this that fits on the inside of the drum where the stud bolts come out?

A. Yes.

Q. That's about three inches thick?

A. I don't know how thick it is.

Q. Would it be about like that?

A. It might be.

Q. All right, when you take six off, you have got 31 inches, haven't you?

A. I guess so.

Q. And then the iron comes down and comes around and your wife was standing on that?

A. Yes, sir. She was standing on the draw bar.

Q. All right, would you say the space was longer than that that she was standing on?

A. Yes, sir, but—

Q. Not the length of it—just the distance across there?

A. I think it was.

Q. You think it was?

A. Yes, sir.

Q. How far would you say it was?

A. Colonel, I never have had occasion to measure that stuff.

Q. Well, would you say it was an inch along there or two inches—you heard the gentlemen testify this morning? Was he correct or incorrect? Do you see this rule across there from where the lamp is?

A. Yes, sir.

Q. Can you tell me how many inches that says? It says 19 inches, doesn't it? See if you can see the figure 18 inches there?

The Court:

What was the question, Mr. Sharpe?

Mr. Sharpe:

Your Honor, I am trying to show that it is only 18 inches from the light to where—

The Court:

—Well, can't you just ask the simple question instead of going through all of that?

Q. Would you say how many it was?

A. I wouldn't say how many inches it was.

Q. Now, how long did you live on that road?

A. I moved there in January, and moved away in January.

Q. You had been living there from January until the accident occurred?

A. I moved there in December.

Q. You moved there in 1954?

A. Yes, sir.

Q. You had been living there constantly until the time the accident occurred?

A. Yes, sir.

Q. You saw thousands of trucks passing up and down that road, didn't you?

A. Yes, sir; a lots of them.

Q. And thousands of automobiles?

A. A good many.

Q. It was a very highly traveled road?

A. Yes, sir.

Q. The surface of the road was dark?

A. Yes, sir.

Q. All right, on this particular night, when you started up the road, you looked straight ahead, didn't you?

A. Yes, sir.

Q. You kept looking ahead all the time?

A. Yes, sir.

Q. Do you know this gentleman over here to my right?

A. I know his face.

Q. Mr. Layne?

A. Yes, sir.

Q. Did you talk to him about this accident on the 28th of July, 1955?

A. It was the night of the accident—no, in other words it was after twelve o'clock.

Q. The circumstances at that time were fresher in your mind?

A. Yes, sir.

Q. What happened was fresher in your mind at that time as to what happened the night before?

A. Yes, I guess so.

Q. Did you tell Mr. Layne, in a signed statement, that the back light was shining down on the road, but you didn't know how close behind the tractor?

A. He asked me could the light be removed and I told him that it could be and then he—

Q. Did you also tell—

Mr. Highsmith:

He was trying to tell him something.

Q. All right, what was it?

A. Mr. Layne asked me could the light be removed either way, could it be adjusted, and I said yes, that it could. He asked me how far back was it shining down on the highway, and I told him that I didn't know.

Q. Did you also tell him: "I had no way to check the speed of the truck because I did not see it before the accident."

A. Yes, sir. I didn't see it.

Q. And then you have no idea how fast the truck was going?

A. Well, it is like I said, she said, "yonder comes one of those big trucks," and then right quick it hit me, just like that. (Snapping fingers.)

Q. Had your wife gained any weight since this picture was made?

A. No, sir, I don't think so.

Q. About the same weight?

A. About the same, yes, sir.

Q. Now, the engine on this kind of a tractor sets on the left side, doesn't it?

A. Kinda.

Q. And is it true that the left front light is directly in front of the left rear wheel?

A. I tell you, I won't say about that.

Q. Do you know about the right front light? Is it not directly in front of the driver's seat in the middle, right where you change your gear?

A. I really don't know about that.

Q. You kept looking ahead all the time, didn't you?

A. Yes, sir, naturally.

Q. All right, you couldn't know what your wife was doing there on the back, standing behind you, could you?

A. No.

Q. It is purely a supposition on your part as to whether she was standing with one foot this way, or with one foot this way?

A. I know she was standing close to the right-hand side because she had the left side of her face to the right of me.

Q. Well, did she have on this dress at that time?

A. Yes, sir.

Q. O. K. Well, according to this picture that Mr. Highsmith was asking you about, it would be about 24 inches from one side of the dress to the other, wouldn't it?

A. That is not the dress she had on.

Q. I know, but the dress she was wearing, if she was the same size as—

A. —well, as I said awhile ago, I am not positive that she had her dress pulled this way, but I have seen her a number of times, riding the tractor, and naturally you know there is going to be a little wind stirring, and she would pull her dress just like that, and hold it with her hand.

Q. Well, this night, you don't know?
A. No, sir. I don't know.

The Court:
Mr. Sharpe, he has testified four times that he didn't see the truck and was looking ahead. I marked it down here.

Mr. Sharpe:
That's all.

The Court:
All right, you can go down. Anything else?

Mr. Highsmith:
We want to tender this picture in evidence.

The Court:
Any objections, Mr. Sharpe?

Mr. Sharpe:
No, sir.

The Court:
All right, it is admitted without objections. Anything else for the plaintiff?

Mr. Highsmith:
We want to introduce this dress.

The Court:
Any objections?

Mr. Sharpe:
No, sir.

The Court:
It is admitted without objection. Anything else, gentlemen?

Mr. Highsmith:
We want to tender this picture of the tractor—of the truck—Mr. Floyd had testified that as far as he could tell it was exactly the same as the one that hit him. Your Honor said you might rule it out on cross examination and it was never exhibited to the jury, and he didn't bring out any difference on cross examination.

The Court:
In other words, your plaintiff testified that it was the same?

Mr. Highsmith:
The same as far as he could tell, yes, sir.

The Court:
All right, do you have any objections to that picture, Mr. Sharpe?

Mr. Sharpe:
Well, Your Honor, of course we couldn't question this witness, or cross examine him about this particular one, but we expect to show by other witnesses that it is not the same kind.

The Court:
Well, of course, you would have that right, but you have no objections?

Mr. Sharpe:
No, sir.

The Court:
Well, I will admit it in evidence, but if you can prove it otherwise, that's up to you. I will admit it in evidence without objection. It's admitted without objection.

Mr. Highsmith:
The plaintiffs rest.

The Court:
All right, proceed for the defendant.

Mr. Sharpe:
Your Honor, Mr. Layne will conduct the defendant's testimony.

The Court:
All right.

(Plaintiffs rested.)

SGT. H. B. HAMRICK, recalled on behalf of the defendant, testified as follows:

Direct Examination.

By Mr. Layne:
Q. State your name, please?
A. Sgt. H. B. Hamrick.
Q. What is your position?
A. Sergeant on the State Patrol, Georgia State Patrol.

Q. And how long have you had that position?

A. A year, last March 16th.

Q. And how long have you been with the State Patrol?

A. Since March 31st, 1949.

Q. And during this time have you investigated a number of accidents?

A. Yes, sir.

Q. What are your principal duties in the State Patrol?

A. It is to patrol all public roads, and to investigate accidents, and to preserve lives on the highways.

Q. Can you recall—not giving me the exact date, but do you recall the date of the accident involved in this case?

A. Yes, sir, July 27th, 1955.

Q. Were you called to the scene of that accident, or not?

A. Yes, sir.

Q. Anyone else called to go with you?

A. Yes, sir.

Q. Do you know who called you?

A. I didn't receive the call. Trooper Hartsfield received the call and came by and picked me up.

Q. Approximately, what time did you get to the scene of the accident?

A. 10:45.

Q. And where was the accident?

A. Two tenths of a mile south of Hazlehurst on U. S. 23, and Georgia 15.

Q. This drawing here, is that a true representation of the area where the accident occurred?

A. I don't know whether it is true or not, but it looks like it.

Q. Will you step down here a minute? First, I will ask you if you know the location of the Beck house?

A. Yes, sir.

Q. In relation to that house, were there any marks on the road that indicated to you as to where the accident occurred?

A. Yes, sir.

Q. What marks did you find?

A. We found some skid marks of a Complete Auto Transit Truck and Trailer, and some scuff marks and skid marks of the tractor which had been hit.

Q. What indicated the point of impact to you?

A. There were some scuff marks where the wheels, the left wheel, had been knocked off th tractor and it taken an angle and went off to the north of the highway and to the side of the highway.

Q. In relation to the Beck house, where did the impact occur?

A. About 18 feet north of the drive way to the Beck house.

Q. On this side then, would that be 18 feet up?

A. On that diagram it would be north, up would be north on that diagram.

Q. Now, from the marks that you found on the highway, in your opinion, was the farmall tractor on the highway or partly on the shoulder?

A. The marks that we found would indicate that the tractor was in the right-hand lane, traveling north, on the hard surface part of the road.

Q. Are you familiar with the shoulders on that road?

A. Yes, sir.

Q. I hand you a photograph and ask you to identify that?

A. Yes, sir, that's where the accident happened, right there.

Q. Now, Sergeant, what is this area over here?

A. What is that area?

Q. Yes, sir?

A. That is the shoulder and ditch of U. S. Highway No. 23.

Q. What kind of a shoulder did that road have on it?

A. Approximately a six foot shoulder.

Q. Was it solid, sandy or what?

A. Well, it has got grass growing on it. It would be a clay. It is sandy, but it is not too sandy, but it is hard enough you can pull a car off on it.

Q. And could you also operate a tractor on it?

A. Yes, sir, you could.

Q. A farmall tractor?

A. Yes, sir, you could.

Q. Now, Sergeant, is this the same side of the road where the accident occurred?

A. That's right. That is the right-hand side of the road, headed north.

Q. Based on the facts that you have stated, in your opinion, was there enough room to operate the whole tractor on that shoulder, or part of it, or what?

A. Yes, sir, you could drive a tractor on that shoulder of the road.

Q. Sergeant, I hand you another photograph and ask you to identify it?

A. That is the scene of the accident on U. S. Highway No. 23.

Mr. Highsmith:

I would appreciate counsel tendering me the photograph before he does the jury.

Mr. Layne:
Well, I tender this photograph.

The Court:
Well, let counsel see it first.

Mr. Highsmith:
I have no objection to this one.

The Court:
Let the Court Reporter identify it. Do you tender those in evidence?

Mr. Layne:
Yes, sir.

Mr. Knox:
This one has been identified as D-6, and we have no objection to it.

Mr. Highsmith:
Let me see the other one. I have no objection to this one identified as D-7.

The Court:
All right, they are admitted without objections.

Q. Now, Sergeant, what skid marks do you see on this skid mark D-7?

A. I see the skid marks of a Complete Auto Transit truck and trailer.

Q. Where did that skid mark begin?

A. It began on the left-hand side of the road, travelling north.

Q. From your investigation, based on where you found the vehicles after the accident, did you reach

any conclusion as to where the Complete Auto Transit was travelling before the accident?

A. Yes, sir. We designated the point of impact there and we followed the marks of the tractor—the skid marks of the tractor and trailer on to where it was parked.

Q. Is it true that before the accident your conclusion is that the Complete Transit truck was travelling north on Highway No. 15?

A. Yes, sir.

Q. In the right-hand lane?

A. Yes, sir.

Q. Now, does this photograph indicate that the truck, driven by Mr. Edwards here, took any other course at or about the time of the impact?

A. Just before the impact he snatched the vehicle to the left.

Q. And, what leads you to believe that?

A. By the right side of the tractor, right side of the tractor and trailer, hitting the left wheel of the farmall tractor.

Q. On what side of the road does the skid marks begin?

A. They began on the left side, as I stated before.

Q. I hand you another photograph and ask you to identify it?

A. That is one of these Complete Auto trucks and it looks like the same one that hit the tractor. The saddle tank there is damaged.

Mr. Layne:

I would like to have this one marked Defendant's No. 8, and I offer it in evidence.

Mr. Highsmith:
No objection.

The Court:
All right, it is admitted in evidence.

Q. Now, Sergeant, this is a small photograph. Will you hold it up there so the jury can see it.

A. You can see here that the rubber marks hit the running board of this tractor here. We call it a tractor. It's a truck. The first mark toward the front of that truck is some rubber marks on the running board, and then you can see where the saddle tank of that truck has been hit a tractor wheel. In other words, the impact was from the saddle tank to the tractor wheel. Now, it hit it so hard until the right rear wheel of that truck was also hit and it broke the shackle spring, the spring shackle, and it hit it with such force as to jerk the drive shaft out from the front part just back of the transmission. In other words, the front part of the drive shaft was laying down on the dirt.

Mr. Highsmith:
The Sergeant said it hit. I am wondering if he is speaking about the truck carrier or the farm tractor.

The Witness:
It had to be because they were both going in the same direction.

Mr. Highsmith:
Which one are you talking about?

The Witness:
The saddle tank hit the left rear wheel—

Mr. Layne:
Your Honor, I think I have the witness on the stand.

Mr. Highsmith:
Well, I didn't understand him to say which one it was that hit who.

The Court:
All right, go ahead.

Q. Sergeant, what type of a blow was this? Was it a glancing blow or what?
A. Well, the truck was traveling north and the tractor was traveling north, and then the driver of the truck cut the truck to the left and the right running board and saddle tank hit the tractor.
Q. Sergeant, what time of day or night did this accident occur?
A. The closest we could arrive to it was 9:55 P.M.
Q. The area that it occurred in, was it light or dark?
A. It was a clear night.
Q. The area, in general, omitting any lights from these vehicles, was the area light or dark?
A. It was clear and at night.
Q. Sergeant, how far did the farm tractor travel after the point of the impact?
A. I didn't measure it.
Q. How far did the truck travel?
A. I didn't measure that either. Trooper Hartsfield did the measuring, as I testified yesterday.

Q. Do you know the distance of the skid marks?

A. I know what Trooper Hartsfield has on his report and what he says.

Q. Do you have that report with you?

A. Yes, sir.

Mr. Highsmith:

Trooper Hartsfield would be the proper one to testify to that, Your Honor.

The Court:

Ask him who made it.

Q. Who made that report?

A. Trooper Hartsfield.

Q. Sergeant, based on the facts that you have stated—first, let me ask you this, did you examine the lights on the rear of this farm tractor?

A. I did not examine it. I did flash my light from the shoulder of the road down to where the tractor was and I saw the light with my flash light, but I didn't go close to the tractor.

Q. Do you know whether it was a red light or a white light?

A. It was a white len.

Q. Now, Sergeant, based on the facts that you have stated here as to where the impact occurred, where the skid marks were on the road, the time of night the damage done to each vehicle, the distances, the type of road that it was there, in your opinion, is it dangerous to operate a farm tractor on this highway at night equipped without a red tail light or not?

A. It is dangerous for any vehicle to run on the highway without any lights.

Cross Examination.

By Mr. Highsmith:

Q. Sergeant, there is an element of danger for any vehicle being on the highway?

A. It is, sir.

Q. Sergeant, is that tractor, in your estimation, about four feet in width?

A. Yes, sir, approximately, I imagine.

Q. The sign that you saw on the right-hand side of the pavement is where you thought the axle broke down?

A. Yes, sir, where the wheel left the tractor.

Q. That was about four feet, you say, from the right-hand edge of the pavement?

A. Approximately four feet, yes, sir.

Q. Then assuming that it was four feet and the tractor was four feet in width and that the road is twenty-two feet wide, then this truck had eighteen feet left to pass it on the left-hand side?

A. I wouldn't—

Q. —If you take four from twenty-two that leaves eighteen?

A. Yes, sir, that leaves eighteen feet.

Q. It would leave eighteen feet of the highway?

A. Yes, sir, of the hard surface.

Q. In addition to the shoulder on the other side?

A. Yes, sir.

Q. So, actually he would have had 24 feet?

A. Yes, six and eighteen is 24.

Q. And I believe you stated on yesterday that you saw no reason why he could not have passed safely on the left?

A. That's right.

Q. How close, in your opinion, could this tractor have gotten, that is, the Complete Auto Transit Unit, could have gotten to the tractor and still turned out and passed?

A. Approximately 15 or 20 feet.

Q. You think he could have gotten within 15 or 20 feet and still have safely passed to the left?

A. No, sir. I mean the way he was he was approximately 15 or 20 feet when he cut to the left.

Q. I see. You think he came up to within 15 or 20 feet of this tractor before he—

Mr. Layne:

If Your Honor please, I object to the opinion of the witness for the reason he has not been qualified as a truck driver.

The Court:

I think he stated that he was a member of the State Patrol and that it was his business to examine accidents. I think you asked him that.

Mr. Layne:

But he is asking him about driving this truck, and I doubt that he has much experience in driving trucks of this kind.

The Court:

I don't know myself. I thought you qualified him on all of that.

Mr. Highsmith:

He asked him his opinion as to what took place and the distances and so forth.

The Court:
Well, go ahead and qualify him then.

Q. Have you had any experience in driving motor vehicles?
A. Yes, sir, and trucks too.
Q. And it is your opinion, from your investigation of the scene of this accident—

Mr. Layne:
We still say that he has not been qualified as to this particular type of truck.

The Court:
Well, Mr. Attorney, you examined him along that line yourself, as I recall.

Mr. Layne:
I didn't qualify him as a truck driver, Your Honor.

The Court:
Well, he said he had driven trucks.

Q. Have you driven trucks and trailers?
A. I have driven log trucks and trailers for several years. I was raised on one of those things.
Q. Large trucks, pulling trailers?
A. Yes, sir, one pulling much more of a load than that one had.

The Court:
I think he is qualified. Did you say it has been your business to examine trucks since you have been on the job?

The Witness:
Yes, sir, trucks and cars.

The Court:
I think he is qualified.

Q. It is your opinion that this Complete Auto Transit Unit came within 15 or 20 feet of the farm tractor before it ever attempted to turn to the left?

A. When he snatched it to the left, yes, sir.

Q. And waiting that late, the running board of the unit hit the tractor, and then the saddle tank?

A. Yes, sir.

Q. And with such force, I believe you testified, it did what?

A. Knocked the left wheel off the tractor.

Q. What did it do to the unit?

A. Well, when it hit, when the right back wheel hit the farm tractor, its left rear wheel, it knocked the center of the back of the tractor truck there, this truck, it knocked it this way, and the front end went back to the right. When it went back to the right, the trailer was pushing the tractor that was pulling it, and it did what is commonly called a "jack-knife".

Q. This portion was pushing the front portion?

A. That's right.

Q. And what axle did that portion knock out—the drive shaft?

A. It was the drive shaft, which is the part that runs from the transmission back to the rear end.

Q. It knocked that out?

A. It knocked it back, the rear axle back, until the drive shaft dropped down. It is hooked in there on a spline.

Q. Sergeant, you made an observation as to how far this until should have been able to see this tractor according to that road way and your knowledge of the road way, would you explain that to the jury on the map drawn of the road way?

A. As to how far I could see?

Q. How far could the driver of this unit see, approaching from the south, going north, with the tractor right in front of it? Would you explain that to the jury?

A. This is the point of impact, right here, (indicating on map). That is where the truck hit the farm tractor. I can see a man standing in the center of the road right here. I can see a man beyond this road here, this dirt road. I can see a man beyond this point in a patrol car. Now, this type of truck here, the seat sits up higher than the seat in a patrol car. Now, this type of truck here is much higher than a patrol car, in other words, you are sitting up higher than you would be in the seat of a regular car, or an automobile, but you can see better than 500 feet or more from this point in the center of the road where the accident happened to back here. Now, that was in the daytime when I had Trooper Hartsfield to stand in the center of the road and I came around the curve in the patrol car, and it is beyond this point here where you can see.

Q. This tractor would have proceeded somewhat north with a man behind him, wouldn't it?

A. Yes, sir, if the tractor was traveling 12 or 15 miles an hour—I don't know exactly how fast the tractor was traveling, but the tractor had to be traveling at the same time the truck was, but the truck caught up with him, therefore the truck was traveling faster than the tractor was. However, there

is not any point on that curve there that you can't see 500 feet, at least 500 feet. Now, if that tractor was back here, the truck would be way down here, because he was traveling faster than the tractor was. If the farm tractor was traveling 12 miles an hour, and if the truck was traveling 48 miles an hour, the truck would be traveling four times as fast as the tractor and would travel four times as far as the tractor would. In other words, if the tractor was coming along here and the truck was coming around the curve here it would catch up with him along here.

Q. Your idea then is that the further back south this tractor was, the further the driver of this truck would have been able to see him? He would have followed him all the way?

A. Well, it straightens out before it gets to the Floyd home there. The road straightens out for some distance.

Q. You have also driven your car on this highway. Did you find any difficulty in seeing things ahead of you, or did your lights shine out in the woods as they followed the curve? Would they go on the roadway ahead of you?

A. They would be on the roadway for a good long distance. I mean it wouldn't just leave the road altogether. Naturally in going around a slanting curve you are going to leave it some.

Q. But still your lights would reveal an object on the right-hand side of the road?

A. Yes, sir.

Q. How far ahead of you?

A. I haven't judged that particular place, but you can see from 300 to 500 feet ahead of you.

Q. From 3 to 500 feet ahead of you, an ordinary object on the road in front of you?

A. Yes, sir.

Q. Thank you, Sergeant.

Re-Direct Examination.

By Mr. Layne:

Q. This test you are speaking of with the other trooper, that was in the daytime and not at night?

A. Yes, as I stated, it was in the daytime.

Q. And you have not made a test to see how far you could see an unlighted object on that road, have you?

A. I have not made a direct test, no, sir, but I have come up behind automobiles on that particular curve without tail lights.

Q. All right, I will ask you this: Are you familiar with the dirt road along here?

A. Yes, sir.

Q. Where does that dirt road start on the highway?

A. I would say around 500 feet south of the Beck home.

Q. All right, about how far does it start from Mr. Floyd's house? Is this it here?

A. 250 to 300 feet to the first place you can pull off there.

Q. All right, now where does that dirt road lead to?

A. It leads into the city limits of Hazlehurst. It goes down and cuts back into the left, back into U. S. 23.

Q. All right, what is located at the highway, where it comes back to the highway?

A. Just south of that road is a filling station.

Q. Is it correct or not that this dirt road runs right behind Davis' Filling Station?

A. I believe it is Davis' Filling Station. I am not positive about that name, but I believe it is Davis' Filling Station.

Q. Now, if a person took that road to go to Davis' Filling Station, how far would he have to travel on the highway?

A. He would have to travel the distance from Mr. Floyd's house to this dirt road, and he wouldn't have to get back on the highway to come into the station.

Q. He would only have to cross the highway one time, is that correct?

A. That's correct.

Q. For what distance would he travel on the highway?

A. The same distance, as I said, between that road and Mr. Floyd's house, around 250 or 300 feet.

Re-Cross Examination.

By Mr. Highsmith:

Q. I want to ask you just one more question, Sergeant. Any person driving an automobile can take the back road and he won't be in any danger of being hit by a truck, will he?

A. There are trucks that travel that road.

Mr. Layne:

I object to that, Your Honor.

The Court:

I don't think that's relevant. I rule it out.

Mr. Highsmith:
Well, I withdraw it.

The Court:
All right, you can go down. Call your next witness.

(Witness xcused.)

JOHN TYRE, Sworn for the Defendant, Testified.

Direct Examination.

By Mr. Layne.
Q. State your name, please?
A. John Tyre.
Q. Where do you live, Mr. Tyre?
A. Hazlehurst.
Q. What kind of work do you do?
A. I am a motion picture operator.
Q. Do you also have a hobby connected with that in some way?
A. Well, photography is my hobby.
Q. I hand you a photograph marked P-2. Will you tell me what that is?
A. That is a picture I made for you around the first of last August.
Q. And what is it a picture of?
A. Mr. Floyd's tractor.
Q. Where was that tractor that you took a picture of located?
A. It was behind the International Harvester place there in Hazlehurst.
Q. I now hand you a picture that is marked D-2, and ask you what that is?

A. That is a picture I made the same day at the same place.

Q. I hand you another photograph marked D-3. What is it?

A. It is still another picture made the same day at the same place.

Q. I hand you another photograph and ask you what that is?

A. It is another picture of the same tractor, made on the same day.

Mr. Layne:

I tender these pictures in evidence.

Mr. Highsmith:

No objections.

The Court:

All right, they are admitted without objections.

Q. Mr. Tyre, I hand you a photograph, which is marked D-9 on the back—hold it up for the jury to see, please—what is that extending away from the right?

A. A yard stick.

Q. Is that an ordinary yard stick?

A. Yes, sir.

Q. How long is it?

A. 36 inches.

Q. Are inches marked on that yard stick?

A. Yes, sir.

Q. Does it extend from the light to a bar on the tractor?

A. Yes, sir.

Q. And what is that distance?

A. About fourteen inches.
Q. About fourteen inches?
A. Yes, sir.

Cross Examination.

By Mr. Smith:

Q. This is the position of the light on the Floyd tractor to the extreme left of that bar, is it not?
A. That's correct.
Q. This other picture of the tractor, did you take that?
A. No, sir.
Q. You didn't take that one there?
A. No, sir.
Q. That shows the light toward the center, doesn't it, further over toward the right-hand side?
A. Yes, sir.
Q. Are you familiar with tractors, John?
A. No, sir.
Q. You see this bar down here, coming down here?
A. Yes, sir.
Q. It takes up some four or five inches, doesn't it, between it and this fender? Can you tell on that rule how many inches that bar takes up between the bar and fender there?
A. It looks like about four or five inches.
Q. About four or five inches? Can you see there on the ruler? You can see the 14 there?
A. It looks like about four inches.
Q. Then if you had 14, and then if the bar was up, a person would have 18 inches between the light and the fender, standing there?
A. Between the fender and the light, yes.
Q. Thank you, John.

The Court:

You can go down. Call your next witness.

(Witness excused.)

ROBERT EDWARDS, Sworn for the Defendant, Testified.

Direct Examination.

By Mr. Layne:

Q. What is your name?

A. Robert Edwards.

Q. Mr. Edwards, what is your occupation?

A. I am a truck driver for the Complete Auto Transit Company.

Q. What type of truck do you drive?

A. A Chevrolet Cab-Over.

Q. How long have you been driving that type of truck?

A. Four years.

Q. Do you recall the day of this accident?

A. Yes, sir.

Q. Where had you left from on the day of this accident?

A. Eight miles north of Jacksonville.

Q. And where had you reached when the accident occurred?

A. About three or four-tenths of a mile south of Hazlehurst.

Q. What time did you leave this point eight miles north of Jacksonville?

A. Fifteen minutes to six.

Q. Did you make any stops on the way, or not?
A. No, sir.
Q. What time did the accident occur?
A. Around nine o'clock.
Q. What distance did you travel from the point you left to where the accident occurred?
A. About 118 miles.
Q. How long did it take you to travel that distance?
A. Three hours and fifteen minutes.
Q. Based on those figures that you have given me, what would be the average speed?
A. Around 37 miles an hour.
Q. Have you calculated that mathematically?
A. Yes, sir.
Q. Mr. Edwards, at the time of this accident, about how fast were you traveling?
A. I would say around 45 miles an hour.
Q. Would you describe the road where the accident occurred?
A. Well, it was a long sweeping curve to the left.
Q. And how did you approach this curve?
A. On the right-hand side of the road.
Q. The point where the accident occurred, is that close to Hazlehurst, or not?
A. Yes, it was about two tenths of a mile, I guess, from the city limits.
Q. And what did you do as you approached this curve at Hazlehurst?
A. As I came around the curve I took my foot off the gas to let my speed die down, because as soon as you hit the city limits of Hazlehurst you have got a red blinker light, a railroad track and a stop sign.
Q. How far past the place of the accident is that railroad crossing?

A. I would say it was at least a tenth of a mile past the Hazlehurst city limits, and I wasn't to the city limits.

Q. Was your truck loaded or empty at that time?

A. It was empty.

Q. Was it your duty and were you required to keep a log of your trips?

A. Yes, sir.

Q. Do you have a log of this particular trip?

A. Yes, sir.

Q. Where is it?

A. Laying on the desk there.

Q. All right, take out the log of this particular trip. What is that?

A. That is a log that the Interstate Commerce Commission requires us to keep at all times. It shows that I left Jacksonville, Florida, at fifteen minutes to six, and marked off at nine o'clock at the city limits of Hazlehurst.

Mr. Layne:

We tender in evidence the log of the trip on the day of the accident.

The Court:

Any objections, gentlemen?

Mr. Highsmith:

Subject to cross examination, we have no objections.

The Court:

All right, it is admitted without objection then, subject to your cross examination.

Q. Mr. Edwards, is that an accurate account of those trips?

A. Yes, sir.

Q. Will you hold that up to the jury and explain how you keep it?

A. We have got 24 hours on this sheet. Everytime we make a stop over fifteen minutes we have got to log that stop and tell where. You are supposed to keep this log up around three hours driving time. That means we make a stop about every 100 or 115 miles. The Interstate Commerce Commission requires that our log not be over three hours behind, and we never know when we are going to be checked. Take the portable scales that Georgia has, they set them up and say "all trucks stop". At times we have an Interstate Commerce Man and a safety man. We never know, so we always keep our logs up to date.

Q. Does that log show you made any stops?

A. I did not.

Q. Between the point near Jacksonville and the place of the accident?

A. No, sir. I drove straight through.

Q. Do you have log, account of trips, that you made before the time of the accident there?

A. Yes, sir.

Q. For what period of time do you have?

A. This runs from the 7th to the 1st, to the 8th to the 4th, 1935.

Mr. Layne:

We tender in evidence these log accounts for the dates the witness testified.

Mr. Highsmith:

No objection.

The Court:
Admitted without objection.

Q. Mr. Edwards, have you examined these log sheets, and are you familiar with them?
A. Yes, sir.
Q. Do you keep them yourself?
A. We keep a copy and the company keeps a copy.
Q. Did you make this record yourself?
A. Yes, sir.
Q. Is it accurate and true?
A. It is, yes.
Q. And on these other log reports, other than the time of the accident, what is shown to be the average maximum speed?
A. 40 miles an hour is our average speed.
Q. Is this diagram here a true representation of the scene of the accident?
A. Yes, sir.

Mr. Layne:
We tender this diagram in evidence.

The Court:
Any objections?

Mr. Highsmith:
I have no objections.

The Court:
It is admitted without objection.

Q. Mr. Edwards, state when you first saw the farm tractor in the road?

A. About the time I got up to the Beck drive way.

Q. And what did you see?

A. I just got a glimpse of something in front of me. My lights were at an angle on the road as I came around the curve, and when my lights first touched it I couldn't tell what it was, so I cut my truck to the left.

Q. Approximately how far does the curve end from where the accident occurred?

A. It started straightening out about the length of my truck before you get to the Beck residence, or Beck drive way.

Q. About how far from the Beck drive way did the accident occur?

A. Eighteen feet north of the Beck drive way.

Q. What part of your vehicle struck the farm tractor?

A. My saddle tank and rear wheel on my truck.

Q. Where was the farm tractor at the time of the impact?

A. It was on the right-hand side of the road.

Q. Was it on the road, or on the shoulder, or where?

A. On the pavement.

Q. How close were you to the farm tractor before you saw it?

A. I would say about the length of my truck.

Q. Did you see any lights from it or not?

A. I did not.

Q. You didn't see any lights from the farm tractor?

A. No, sir.

Mr. Layne:

This has already been marked D-4, and we offer this photograph in evidence.

Mr. Highsmith:

I have no objection. In fact, it has already been admitted. They put it in to start with.

The Court:

What is the number of that?

Mr. Layne:

D-4.

The Court:

All right, it is admitted in evidence without objection, if it has not already been introduced.

Q. Does that look similar to the farm tractor involved in the accident?

A. It looks about like the same size of the one I hit.

Q. After the accident, did you examine this farm tractor?

A. Yes. After we got all the commotion settled down I walked down and looked it over.

Q. And what kind of a light was on the rear of it?

A. It was a white light.

Q. While it was on the highway and before the accident, did you see any light or not?

A. No, sir. I did not.

Q. Did you learn later on, after the accident, that there was something behind the tractor, on the tractor?

A. Yes. I learned that Mrs. Floyd was standing on the back of the tractor.

Q. State to the jury whether you saw any lights whatsoever from the tractor or not?

A. The road was completely black when I rounded the curve.

Q. What did you see? Did you know what you saw, or not?

A. Not at the time. I didn't have time. I was too close when my headlights picked it up. I was trying my best to miss it.

Q. And what did you do then?

A. I cut sharp to the left and crossed the center line.

Q. I show you a photograph here. Hold that up to the jury and explain what it shows. That is Exhibit marked D-7.

Mr. Layne:

We tender this in evidence, if it hasn't already been tendered.

The Court:

What do you gentlemen say?

Mr. Highsmith:

It has already been tendered.

The Court:

All right.

The Witness:

I was coming north, around this curve, and as I rounded this curve my headlights, part of them were shining down the Beck driveway, and I first got a

glimpse of something in front of me just as I was even with the drive way, and I swerved around and crossed the center line and my saddle tank, when it hit, knocked me—I was headed across the road with my tractor, and when I hit, when I hit with my saddle tank and rear wheel it knocked my tractor back around to the right. That is where the skid marks started across the white line, right here, and my trailer followed me on down the road. I was coming down side ways with the front part of my trailer being pushed—the front part of my truck being pushed by my trailer, and wound up here off the road at the end of the skid marks.

Q. Now, how far did you travel after the place of the impact?

A. Around 150 feet, I think.

Q. Did you do everything you could to avoid the collision?

Mr. Highsmith:

That would be a conclusion on the part of the witness, if Your Honor please. He could state what he did.

The Court:

What do you say?

Mr. Layne:

Well, he has stated the facts on which he bases the opinion and now he has a right to state it.

The Court:

You may ask him, based on that. Just ask him the question and then—

Mr. Highsmith:
To save time, I will withdraw the objection.

The Court:
All right.

Q. Mr. Edwards, did you do everything that you could to avoid striking the farm tractor?
A. Yes, sir.
Q. Now, is there another house located beyond the Beck house on this highway?
A. The Shuman house, on the left-hand side.
Q. Did your truck go as far as the Shuman house, or not?
A. No. I would say I was about 35 feet back this side of there when I went in the ditch.
Q. What law enforcement officers were at the scene of the accident?
A. The Hazlehurst police, the County Sheriff, and the State Highway Patrol, and the "Markwell" Insurance and my safety man.
Q. Did you see Mrs. Floyd, who is reported to have been standing on the back of the tractor that night?
A. Yes, sir, I did.
Q. How was she dressed?
A. She had on a dress. I couldn't tell much about it in the dark.
Q. Do you know anything about her size?
A. She looked to be about a size 6 and weighed about 150 pounds to me.
Q. Did you see any of these policemen make a test on the light of this tractor?
A. When we walked down in the ditch to the tractor there wasn't a light hooked up to the tail light.

Q. Were any tests made?

A. I think one of the drivers replaced the wire and it wasn't burning.

Q. I hand you Plaintiffs' Exhibit No. 5, and ask you what that is?

A. That is a Complete Auto Transit truck from Atlanta, Georgia.

Q. Is that the truck that you were driving?

A. No, sir.

Q. Is there any difference between that truck in that photograph and the one that you were driving?

A. Yes. This is a V-8 truck, and mine was a 6 cylinder.

Q. Is there any difference in size?

A. Yes, there is quite a bit of difference.

Q. State the difference, please?

A. This is our latest truck, with a sloping cab, and wrapped around windshield, which mine was a straight up truck, with a two piece front windshield, and my cab was straight up the back, instead of sloping like this, and this trailer is nothing like mine at all.

Q. Is that truck trailer wider, or how does it compare with the one you drive?

A. This is a wider trailer than the one I had. This is the old type, white head and tail trailer, and mine was a new Fruehauf.

Q. Mr. Edwards, in your employment, do you have certain hours, a certain maximum number of hours, that you are allowed to drive?

A. Ten hours at the time.

Q. And, how long had you been driving at the time of this accident?

A. Three hours and fifteen minutes.

Q. How long had it been before you went on duty that day? How long had you been off duty?
A. I taken a day off in Jacksonville.

Mr. Layne:
The witness is with you.

Cross Examination.

By Mr. Highsmith:
Q. Mr. Edwards, while we are on this, I believe it is admitted by the defendant company, your company, in its answer, that the tractor and trailer were 40 feet—four feet long, is that correct?
A. Around 44.
Q. Around 44 feet. And it is also admitted that it was 8 feet in width, is that correct?
A. Now, I don't know. I don't remember about admitting it.
Q. If your counsel, your company, says that it was 8 feet in width, is that correct, or not?
A. If they say it is.
Q. That's right, if they say it is right?
A. Yes.
Q. You are familiar with the regulations of the Georgia Public Service Commission, are you not?
A. Yes, sir.
Q. And don't you know that 8 feet is the maximum width?
A. I know that is the maximum width, yes.
Q. You are not saying that this tractor of your company is wider than the maximum width?
A. No, sir. Mine is not quite eight feet.
Q. They were wrong about what they admitted?
A. Not in that.

Q. I am talking about what was admitted in these pleadings, that the tractor you were driving on this occasion was eight feet in width. They were wrong about that?

A. No, I wouldn't say they were wrong.

Q. Is that even similar to it at all.

A. Well—

Q. —does that look like a Complete Auto Transit truck?

A. Yes, that is one of the older ones, the trailer is an old one, but that is a brand new truck.

Q. Is it even similar to it?

A. Yes, sir. It looks like it.

Q. It looks like it, doesn't it?

A. No, I don't believe it does either, when you look at it close.

Q. You say you are familiar, Mr. Edwards, with the safety regulations of the Georgia Public Service Commission?

A. Yes, sir.

Q. You violated several of those that night?

A. I don't see how.

Q. Well, did you? You know what they are, don't you?

The Court:

I think he said he didn't know if he did.

Q. Did you say you did not?

A. That's right.

Q. How far ahead of you did you say you could see?

A. Well, coming around the curve, I wouldn't know how to measure the distance because it is hard

to tell exactly how far you can see when you are moving.

Q. Don't you know the safety regulations require that you can never operate the truck unless you have lights on there of sufficient intensity and sufficiently aimed to that any object or vehicle on the road will be revealed at least 350 feet ahead? Isn't that the correct rule?

A. Well, I tell you—

Q. —well, is or isn't it a correct rule?

A. What?

Q. Isn't that the rule?

A. Read that again.

Q. That your lights shall be of sufficient intensity—"there shall be an utmost distribution of light so aimed and of such intensity so as to reveal persons and vehicles at a distance of at least 350 feet ahead"?

A. On a straight road, I would say yes.

Q. Under all conditions of motion. Could you see 350 feet ahead with your lights?

A. There are a lot of places that you can't see that far ahead.

Q. You were operating at this time when you could only see but eighteen feet ahead? Your lights didn't reveal this vehicle except for eighteen feet. Isn't that your testimony?

A. That is when I first noticed something in front of me.

Q. Were you looking?

A. Yes, sir. I was looking.

Q. And your lights didn't reveal an object on the highway in front of you except for 18 or 20 feet?

A. I was coming around a sweeping curve, and when I first got a glance or a glimpse of something in front of me I was about my trailer length

Q. Is that a correct map of that curve in that road?

A. About right.

Q. And this was the sweeping curve that you were coming around?

A. Yes, sir.

Q. And when you were 500 feet back here you couldn't see ahead of you?

A. I couldn't see anything up there, except black.

Q. So then you didn't have lights that would reveal a person, object or vehicle on that road 350 feet ahead of you?

A. I had sealed beam lights required by law to be on that truck.

Q. Lets find out what you could see ahead of you. Could you see, with your lights at that time, on that road, 350 feet ahead?

Mr. Layne:

Your Honor, I think the witness has answered that a half a dozen times as to when he saw the object on the road.

The Court:

I think he has too.

Q. Then you were not in compliance with that regulation, were you?

A. I was seeing as far ahead as the lights would allow me to see.

Q. Now, did you pass safely to the left of that vehicle going in the same direction?

A. Did I do what?

Q. In overtaking a vehicle going in the same direction, did you pass safely to the left of that vehicle?

A. No, I didn't.
Q. Then you violated this rule, didn't you?
A. Well—

Mr. Ringle:
Your Honor, I think all of these questions are matters for the jury to determine.

The Court:
Well, he has got him on cross. I think he is entitled to examine him about that.

Q. You violated this rule of safety regulations, didn't you: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the road-way until safely cleared of the overtaking vehicle." You didn't do that, did you?
A. If there had been a light on it so I could have seen it, I would have.
Q. Well, did you do this?
A. It is evident that I didn't.
Q. Does this rule say anything about a vehicle with a light on it?
A. I imagine you will find one in there that it should have properly marked tail lights and reflectors.
Q. Is there one in here that says a person on the highway shall carry a light on the rear?
A. I haven't memorized the book, sir, I couldn't tell you.
Q. Well, you said you knew them?

A. I know there is a state law which requires a light on the rear end of any object on the state highway.

Q. Did you say that you knew these safety regulations?

A. I can't quote you the book page by page, no.

Q. All right, lets see if you didn't violate another rule: "No motor carrier shall drive or permit any person to drive any motor vehicle operated in interstate or Interstate Commerce unless such person has a knowledge of the rules and regulations issued by the Georgia Public Service Commission."

Mr. Layne:

Your Honor, I think the witness has already answered it, that he knows some of them but he can't quote them all.

The Court:

Well, I think he can answer that.

Q. You do have a knowledge of them, Mr. Edwards?

A. I have read the book.

Q. Did you retain what you read?

A. Well, there is so much of it, I don't make it a practice of reading it every day.

Q. Now, isn't there another one here that you didn't comply with? You weren't driving at such speed but what you could stop when you did see this vehicle? You couldn't stop because he was too close to you, wasn't he?

A. That's right.

Q. And you had been driving on that highway, on that particular curve, and you knew about it before

this time, didn't you? You had been there the day before? You had been driving over it for how many years?

A. A good many years.

Q. And you were familiar with it, wasn't you?

A. Yes, sir.

Q. Was there any difference in your lights at this particular time that it wouldn't reveal a person or a vehicle except 18 or 20 feet then it would have been at some other time, or had that always been true?

A. Well, I tell you, in coming around that curve, if I had been meeting a car I could have seen his headlights. If I had been catching up with one I could have seen his tail lights but I didn't see either thing.

Q. You saw all these houses on this road?

A. I see them a lot of times, yes, sir.

Q. You knew that people lived in them?

A. Yes, sir.

Q. Didn't you realize that sometimes people had to cross the road at night?

A. Sure.

Q. And didn't you realize that there was a possibility, when you couldn't see but 18 or 20 feet, that you could stop your vehicle in time to keep from killing them?

A. Well, I was within the speed limit.

Q. You were in speed limit, but you—

The Court:

Well, didn't he testify two or three times that he couldn't see because he was coming around a curve?

Mr. Highsmith:

But he said he couldn't see but 18 or 20 feet at this particular spot, and that is what I am asking him

about, and the law says that if you can't see you must reduce your speed so you can control your vehicle. I want to read him this regulation and ask him if he complied with it. "The driver of every vehicle shall, consisten: with the requirements, drive at an appropriate reduced speed when travelling on any curve." You said you did that. "In every event the speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway." Now, did you have your speed so controlled as to avoid hitting a person or vehicle on that highway?

A. I had it sufficiently under control that had any vehicle had proper lights I was approaching I could have stopped.

Q. Well, a vehicle without lights and a person walking, could you have stopped?

A. No.

Q. You couldn't stop?

A. I couldn't see him.

Q. Your car lights don't reveal anything ahead of you unless it has got lights?

A. It reveals the road.

Q. Nothing but the road? It reveals nothing on the road unless it has got lights? You can't see it?

A. I could see.

Q. You can see it if it has lights or doesn't have lights?

A. It takes a certain amount of distance to distinguish one with lights and one without lights.

Q. Well, how far can you see something on the road without lights?

A. I can't until my headlights hit it.

Q. How far will your headlights throw a beam?

A. Well, at this particular time I was coming around a curve and my lights were on the shoulder of the road.

Q. They were on the shoulder of the road, and you knew that?

A. That's right

Q. And you knew that people might be on that road?

A. I didn't have any way of knowing it.

Q. You have seen people on that road?

A. I saw cars on that road, but I very seldom saw people walking on that road.

Q. You have seen them, though?

The Court:

Well, lets get down to the issue. I understood the witness to say that if the car had had light on it he could have seen it, and also he said the reason he didn't see it was because he was driving on a curve. I think that is what he said, that he couldn't see it until he was in 18 or 20 feet of it because it didn't have any lights and he was on a curve. I think that is what he said.

Mr. Highsmith:

And there have been other testimony that you could see 500 feet on that curve.

The Court:

I understand, but you have been through all of that.

Q. Do you recognize this dress that Mrs. Floyd had on that night?

A. No, sir.

Q. Was it a light colored dress?
A. Tell you truth, I couldn't tell you.
Q. You don't know?
A. No, sir.

The Court:
He has already testified that he didn't recognize. Why keep going over and over it?

Mr. Highsmith:
He said he knew she had a dress—

The Court:
—had a dress on, yes, but he said he couldn't identify it as being the dress she had on that night.

Q. You testified that she was five feet, six, in your opinion, and 150 lbs.?
A. I said it was about that.
Q. You think that would be the dress—

The Court:
It is not a question as to whether she could have got into that dress or not. He said he didn't know whether it was the same dress or not. You have been over all of that.

Mr. Highsmith:
I was going to ask him if this being a light colored object would it be revealed in his lights.

The Court:
But he said he couldn't testify to the dress, but you can ask him that question.

Q. Would a light colored object, such as this dress, be revealed in your headlights on a person on that road that night with or without lights?

A. It would show at the time my lights hit it, yes, sir.

Q. And your testimony is that your lights, around that curve, wouldn't hit it until you were eighteen feet away?

A. That is what I would say.

Q. Had you seen it in time there was nothing to prevent you from going to the left and around that vehicle?

A. That's right.

Q. There was no approaching or oncoming vehicle coming toward you?

A. No, sir.

Q. Mr. Edwards, how much does the tractor of your vehicle weigh?

A. Around 15,000 pounds.

Q. Is that just the tractor?

A. That's the whole outfit.

Q. It carries how many cars?

A. Four.

Q. Two on top, like this?

A. That's right.

Q. And then two more inside?

Mr. Layne:

Your Honor, it is already admitted that the car was unloaded.

The Court:

Yes, he said it was 15,000 pounds as it was.

Q. The trailer part of that vehicle is at least four times the size of an ordinary car? It carries four cars?

A. It wouldn't have to be four times as large because two cars are on top of the others.

Q. How high is it?

A. I would say about twelve feet, six inches, loaded.

Q. And it is the length of two cars, isn't it?

A. Yes, sir.

Q. And it is more than twice as high as two cars?

A. Yes, it is a little higher than two cars.

Q. And that is the trailer alone?

A. Yes, sir.

Q. What type of cars do you haul? Who for?

Mr. Layne:

Your Honor, all the testimony, including the plaintiffs' own testimony, is that there were no cars on the truck at this time, and it is irrelevant.

Mr. Highsmith:

I asked him what type of cars, in the course of his business, he hauled?

The Court:

Do you think that is admissible?

Mr. Highsmith:

I don't insist on it.

The Court:

I don't think all of that is admissible as to what type of cars he hauled. Lets get down to the facts in this case.

Q. How close, Mr. Edwards, can you drive to a vehicle and still pass it to the left?

A. Well, it is according to how fast the vehicle in front of me is traveling and how fast I am going.

Q. Well, lets say it is traveling 12 or 15 miles an hour and you are traveling at the rate of speed you said you were traveling?

A. Well, it would take, I would say, around 30 feet.

Q. Around 30 feet. Within anytime in 30 feet you could pass safely?

A. Yes.

Q. Mr. Layne asked you about different pictures. I exhibit to you the two pictures shown you by Mr. Layne, one being the actual tractor, the Floyd tractor, that you hit, and this is the tractor he asked you if it was the same kind of a tractor. Is there a difference you see with respect to the lights on those tractors?

A. I see one is a little to the left of the seat.

Q. Yes. Which one is further to the right away from the fender?

A. This is about half the width of a light further away.

Q. Which one? Will you hold it up to the jury and say which is the furtherest?

A. Well, it might not be half a width, but it is over just a little bit further than this tractor here.

Q. Now, you said that the cord to the light was not connected at the time you went over and looked at the tractor?

A. That's right.

Q. How many pieces was it in then?

A. Well, it was dark and we just had a flash light and it was pretty hard to tell but it was broken.

Q. How many pieces was it broken into?

A. I couldn't say about the frame, but the wheel was off.

Q. You don't know whether the other part was broken into or not?

A. I know one part of the frame was broken.

Q. You can't see very well? Can you see very well?

A. I didn't inspect the tractor inch by inch.

Q. In the light of your flashlight could you tell whether the main part of the tractor was in one or two pieces?

A. I know the frame was broken and one wheel was off.

Q. Would you say it was broken into about like this model there?

A. No, I wouldn't say that. I am like the Sergeant in the State Patrol, I didn't inspect it that close.

Q. You couldn't tell whether it was broken into or not. Assuming that it was broken into, would that have very likely pulled the cord out of the light?

A. I don't know. I don't know whether it would have pulled it out or not.

Q. It broke your drive shaft on your tractor, didn't it?

A. It slipped out.

Q. It just slipped out?

A. Yes, sir.

Q. You got a glimpse of Mrs. Floyd on the tractor?

A. I didn't get a glimpse of her on the tractor. I didn't know that it was a tractor until I hit it.

Q. You don't know what it was? You couldn't see? This was a gasoline engine?

A. Yes, sir.

Q. And not a Diesel?

A. No, sir.
Q. It was a gasoline engine?
A. Yes, sir.
Q. That's all.

(Witness excused.)

W. I. GRAYVILLE, Sworn for the Defendant, Testified.

Direct Examination.

By Mr. Layne:
Q. What is your name?
A. W. I. Grayville.
Q. What is your position, or occupation?
A. County Surveyor of Toombs County.
Q. How long have you been such?
A. Going on four years.
Q. Do you have any occupation other than with the county?
A. No, sir.
Q. Do you also do survey work for other people not connected with the county?
A. Private surveying, yes, sir.
Q. And how long have you been doing that survey?
A. Well, for myself, about six years.

Mr. Highsmith:
We will admit his qualifications.

The Court:
All right.

Q. Mr. Grayville, will you state what that is?

A. That is a plat of a portion of the road southeast of Hazlehurst on State 15, I believe it is, with a dirt road leading off from it, or a pulled up road, it is not paved.

Q. Is that an accurate survey of that area?

A. Yes, sir.

Mr. Highsmith:

We will admit that is a correct representation of that road.

The Court:

All right, that answers that.

Mr. Layne:

We tender this drawing in evidence.

Mr. Highsmith:

We have no objection.

The Court:

It is admitted without objection.

Q. Now, Mr. Grayville, on this survey that you made, did you measure certain distances, and what did you measure it with?

A. I measured both of those roads.

Mr. Highsmith:

I will admit that all figures shown on there are correct.

The Court:

Well, that covers that.

Q. What is the distance that a person would have to travel, if he used the dirt road and left from Mr. Floyd's house, to Davis' Filling Station?

A. If he used the dirt road?

Q. Yes, sir. What distance would he have to travel along the highway?

A. Along the highway?

Q. If he made the trip from Mr. Floyd's house, using the dirt road up to Davis' Filling Station, what distance would he have to travel on the highway before he reached the dirt road?

A. 234 feet.

Q. Now, Mr. Grayville, did you measure the distance from Mr. Floyd's house to Davis' Filling Station along the highway?

A. Yes, sir.

Q. What is that distance? If you don't have it, you can look at the drawing.

A. 2574 feet.

Q. I think you have got it backwards. What is the distance on the highway?

A. 2,844 feet.

Q. What is the distance on the dirt road?

A. 2,570 feet to the back of the filling station. That is not at the intersection.

Q. Well, at that point, did you reach the filling station?

A. Yes, sir. You can cut in there. It is the same area.

Q. If a person traveled from Mr. Floyd's house to Davis' Filling Station by this dirt road, how much further would he travel than if he traveled on the highway?

A. Around 275 feet.

Q. Have you traveled over that road?

A. Five or six times, yes, sir.

Q. I hand you a photograph marked D-4, and ask you if you were present when that photograph was made?

Mr. Highsmith:

The photograph has been admitted in evidence.

Q. I am asking you if you were present?

A. Yes, sir.

Q. What is that a photograph of?

A. That is a photograph of a Farmall Super-A Tractor.

Q. Is that a correct representation of a Farmall Super-A Tractor?

A. Of this tractor, yes, sir.

Q. How far away was the photographer standing when he took it?

A. Sixteen feet.

Q. Did you make certain measurements of that tractor?

A. Yes, sir.

Q. Will you hold it up so the jury can see it? Did you measure the distance from that light to this bar, that hydraulic lift?

A. Yes, sir.

Q. What is that distance? You can look at your notes. If it is permissible, Your Honor, I would like to put the photograph down here so he can stand here and look at his notes. What is the distance from the bar here going on down here, this hydraulic lift? (indicating on photograph.)

A. Fourteen inches.

Q. Did you measure the distance that this draw bar is from the ground?

A. Yes, sir.

Q. What is that?

A. Eighteen and a half inches.

Q. Did you measure the overall width of this tractor?

A. Yes, sir.

Q. What is that?

A. Fifty nine inches.

Q. Now, from what point did you measure there?

A. From the outside of these hooks to the outside of the tires here.

Q. Is it correct that this extends a little bit beyond the tires? (indicating on photograph.)

A. Yes, sir.

Q. Did you measure the distance of the light from the ground?

A. Yes, sir.

Q. What was it?

A. 36 inches.

Q. Did you measure the size of that light?

A. I did not measure it.

Q. Did you give me before the distance between the hydraulic lift, or not?

A. The distance between what?

Q. The distance between that bar and this bar over here?

A. The hydraulic bar is 21 and ½ inches.

Q. Now, you observed this tractor, did you not?

A. Yes, sir.

Q. Would a person standing on the draw bar also be restricted to the area between those two bars on the hydraulic life, or not?

A. Yes, I think he would have to stand between—

The Court:
What is the purpose of all of this?

Mr. Layne:
Your Honor, our defense is that a woman standing on the back of this farm tractor and that she covered up the light.

The Court:
Can't you just ask him that question, that if a woman was standing there whether it would cover up that light or not.

Mr. Layne:
Well, I have to lay the proper foundation first, Your Honor.

The Court:
To ask him that question?

Mr. Layne:
Yes, sir, I think so.

The Court:
Well, go ahead. I am not trying to tell you how to run your case.

Mr. Highsmith:
I will let him state his opinion without laying the foundation, if that is what he is after.

The Court:
Well, he says he will let him state his opinion without laying the foundation. So that eliminates that.

Q. I hand you another photograph and ask you what that is?

A. That is a photograph of Mrs. Al Layne.

Q. Is this a true representation of this person?

A. Yes, sir.

Q. Now, is—

Mr. Highsmith:

I have no objection to the attorney's wife picture.

Mr. Layne:

Your Honor, we tender in evidence this picture.

The Court:

All right, it is admitted without objection.

Q. Now, Mr. Grayville, were you present when that picture was made?

A. Yes, sir.

Q. I hand you another picture, Mr. Grayville, and ask you to identify it?

A. That is a photograph of Mrs. Layne standing on the draw bar of the particular tractor that I identified awhile ago.

Mr. Highsmith:

I want to object to this unless it is shown that the light which is shown on this tractor used in the exhibit was in the same place that it was on the Floyd tractor, and that Mrs. Layne had the same dimensions as Mrs. Floyd did.

Mr. Layne:

I am going a little bit further with this, Your Honor.

Mr. Highsmith:
I will admit it without him proving it.

The Court:
All right, he admits it all, he says.

Q. How much does the lady in the picture weigh?

The Court:
He said he admitted the picture and everything in connection with it.

Mr. Highsmith:
I just admitted the picture.

Mr. Layne:
Your Honor, I would like to show that she is a smaller woman than—

The Court:
—go ahead.

Mr. Layne:
That she is a smaller woman that the woman who was standing on the back.

The Court:
You can go ahead.

Q. Mr. Grayville, how much does the lady in this picture weigh?

A. One Hundred and one pounds and a half on March 11, 1956.

Q. And how do you know that?

A. I went around to Aikens' Hospital and weighed her on the hospital scales.

Q. Was that immediately after these pictures were taken or not?

A. In about ten minutes.

Q. Also, from your observation, is that your opinion of her weight and size, or not?

A. Yes, sir.

Q. Mr. Grayville, on that picture there state what instructions, if any, were given to her when she got on the tractor?

Mr. Highsmith:
We object to that, Your Honor.

The Court:
Yes. Yes, I don't see how that would be admissible, any instructions he might have given to her. I think that would be hearsay.

Mr. Highsmith:
He can state where she was and what she did, but not any instructions they might have given her.

Q. Mr. Grayville, state what part of the tractor she was standing on?

A. She was standing on the draw bar.

Q. Does she obscure the rear light on that tractor or not?

A. Yes, sir, I can't see it.

Q. Now, what type of light did this tractor have on the front of it?

A. Two head lights sorta like the rear one.

Q. Speaking of the headlight to the driver's left, where is it located?

A. The left light, well—

Q. Well, looking from the rear of the tractor, is the light on the front, the front light, obstructed by anything or not?

A. Well, I looked at it from the front back toward the rear, and that tire has it blocked.

Q. All right, the light on the opposite side, the right light, where is it located? Can you see it on the photograph?

A. Yes, sir, you can see it on the photograph. Looking back toward the back it would be in line.

Q. You can see it on which photograph?

A. This one. (indicating.)

Q. You can see on the photograph no one was standing on?

A. Yes, sir.

Q. Could you see it on the photograph of the person standing on the draw bar or not?

A. No, sir.

Q. Mr. Grayville, I hand you another photograph. Identify that one, please?

A. That is a photograph of the same Farmall Tractor.

Q. Which one?

A. That is a photograph of the same farmall Super-A Tractor with Mrs. Layne standing on the draw bar with myself, W. I. Grayville, in the driver's seat with her chin over my right shoulder.

Mr. Layne:

We offer this photograph in evidence.

Mr. Highsmith:

I have no objection.

The Court:
It is admitted without objection.

Q. Mr. Grayville, state whether or not a person standing in that position she obstructed the rear light, the view of the rear light, on that farm tractor?
A. She did on that one, yes, sir.
Q. Mr. Grayville, based on these tests and demonstrations that you have made in these photographs, in your opinion, would a woman weighing between 130 and 135 lbs., and clothed in a dress obscure the light on the rear of a Super-A Farmall Tractor?
A. She would on that particular tractor, yes.

Mr. Layne:
You may have the witness.

Cross Examination.

By Mr. Highsmith:
Q. The draw bar in this picture that Mrs. Layne is standing on, is she standing on the right of the draw bar or in the center of it, this one in which she is obscuring the light?
A. She was a little bit to the road.
Q. Come over here and look at it and show it to the jury. Now, looking at that, she can move further on over to the right and be out of the way of the light, can't she?
A. She could move on over here to where she would be out of the way of the light, yes, sir.
Q. If she moved on over further, you don't know whether she did or not?
A. No, sir.

Q. The purpose in taking this picture was to show that the light was obscured, wasn't it?

A. I don't know about that.

Q. Also, let me show you another thing. Do you notice a difference in this one that has been admitted as the actual tractor here? Do you see where that light is?

A. Yes, sir.

Q. Do you see where this light is on this tractor that you used as an illustration?

A. Yes, sir.

Q. This is some three or four inches more over to the right, isn't it?

A. Yes, sir, it is further over.

Q. It is further over, isn't it?

A. Yes, sir.

Q. Further over in the center?

A. Yes, sir, off from the seat, it looks like.

Q. Yes, sir. So you don't know what, if they had been using this tractor, the light over there on the left-hand side, whether Mrs. Layne would have obscured that light or not, do you?

A. No, sir.

Mr. Highsmith:

Thank you. That's all.

Re-Direct Examination.

By Mr. Layne:

Q. Mr. Grayville, I hand you a booklet and ask you to identify it?

A. This is a booklet on information on a Farmall Super-A tractor.

Re-Cross Examination.

By Mr. Highsmith:

Q. You saw the draw bar on this tractor, and you know about the size of it and all?

A. Yes, sir.

Q. You saw it on the tractor?

A. Yes, sir.

Q. You recognized one when you saw it?

A. Yes, sir.

Q. Is that a draw bar on a Super-A Farmall Tractor?

A. Similar to it.

Q. And I can stand over here and leave half of it, can't I?

A. Over half of it.

The Court:

All right, do you want to tender that?

Mr. Layne:

Yes, sir.

Mr. Highsmith:

I have no objection.

The Court:

All right, it is admitted without objection.

Q. Are these tractors all painted red? Have those you have seen painted red? I mean this part here.

A. Most of them were. I didn't notice whether that particular one on that tractor was or not.

Q. Most of them that you have seen are red?

A. Yes, sir.

Re-Direct Examination.

By Mr. Layne:

Q. Mr. Grayville, eliminating the shadows of the extra wheels on there, is that tractor shown in that diagram similar to the one in which you were shown in the picture or not?

A. Yes, sir, it is similar to it. I didn't inspect it closely but it is similar.

Mr. Highsmith:

Your Honor, it is in evidence and he can show anything he wants to to the jury. He doesn't have to do it at the present time.

The Court:

All right, you may go down.

(Witness excused.)

DAVE BARNARD, Sworn for the Defendant, Testified.

Direct Examination.

By Mr. Layne.

Q. State your name, please?

A. Dave Barnard.

Q. Mr. Barnard, where do you live?

A. I live in Jeff Davis County.

Q. Where at in Jeff Davis County?

A. Well, I live at this time out east, about a mile from town.

Q. At the time of this accident, where were you living?

A. On the river down there, on the Lumber City and Hazlehurst road.

Q. Talk a little louder, please. Are you familiar with this area where this accident occurred?

A. Yes, sir.

Q. Do you drive on that road often, or not?

A. Not so much right now, but along when that was I did.

Q. Are you familiar with the fact that to the northeast of that highway there is a dirt road, or not?

A. Yes, one coming in each way, one from each way, south and north.

Q. Do you recognize this as being a true representation of that area?

A. Yes, sir, it is pretty true.

Q. Do you know of a dirt road close to the highway, or a dirt road leading from the highway close to this Floyd house?

A. Yes, sir, right on down this side a piece.

Q. And about how far is that dirt road from the Floyd house?

A. It is about, I imagine, 50 yards.

Q. And, where does that dirt road lead to?

A. It goes on around and comes into Mr. Davis' garage. I imagine it is around a mile around there.

Q. Do you have any idea of the difference in distances in traveling from Mr. Floyd's house by the highway and by the dirt road?

A. Yes, sir, there is a right smart difference.

Q. Do you have any idea about how far these two roads are apart up there?

A. The widest part?

Q. No, sir. Any place along there? Is there also a dirt road connecting them at one point?

A. That is the only one.

Q. Is that dirt road about a city block long?

A. Yes, sir, a city block, several of them. It starts off, you see, at kind of an angle and keeps bending right on around.

Q. And about how far does that dirt road start from Mr. Floyd's house—or how far is Mr. Floyd's house to that dirt road?

A. About 50 yards.

Q. Have you traveled on that dirt road?

A. A right smart.

Q. Do you recall the night of this accident?

A. Well, it was sometime the last part of July—about the last week in July.

Q. On the night on this accident, did you drive by Mr. Floyd's house or not?

A. Yes, sir.

Q. In what direction were you driving?

A. I was coming north.

Q. Going to Hazlehurst?

A. Yes, sir, going on through.

Q. Did you see anything on the highway that night?

A. I overtaken a tractor right at the house, just as it turned in good on the main road.

Q. What were you driving?

A. A Ford truck.

Q. And you were going toward Hazlehurst?

A. Yes, sir.

Q. And what did you see on the highway?

A. I saw a tractor.

Q. And who was on that tractor?

A. Well, it being dark like it was, I figured that it was Mr. Floyd. He pulled out from there, from his house.

Q. About what time of night was that?

A. It was after dark a pretty good while. I had been up to the tobacco farm, firing up some flues, getting them started. I didn't keep up with the time.

Q. Was there another person on that tractor, or not?

A. Yes, sir, there was a woman standing on the back.

Q. Now, as you approached that tractor, did you have on your lights?

A. Yes, sir.

Q. As you approached that tractor, did you see a light on the rear of it, or not?

A. Now, I am going to tell you about that light on the rear, you see it was between those houses with both porch lights on—one sits down below here, and you could be blinded by the electric lights, and I wouldn't be positive about that tail light. I didn't have time to stop and check it.

Q. You didn't see a tail light on it?

A. No, sir, I didn't see any light.

Q. Was Mr. Floyd living in this house at that time? (Indicating.)

A. Yes, sir.

Q. Do you know whether the present Mrs. Floyd and Mr. Floyd still live there?

A. Yes, sir, they still live in that house.

Q. About what was the size of Mrs. Floyd, that is, the deceased Mrs. Floyd?

A. I never did know exactly, but—

Q. We are not talking about the present Mrs. Floyd. We are talking about the one that died?

A. That was the one I had reference to.

Q. About how large was she?

A. She was around about five and a half feet, just guessing at it.

Q. About how much did she weigh, in your opinion?

A. About 135 or 40 lbs., I imagine.

Q. In your opinion, did she look heavier than the lady in that picture, or not?

A. No, sir.

Q. She didn't look any heavier than that?

A. Yes, sir.

Q. Did she look as heavy as that one?

A. It has been a pretty good while. I can't tell you right exactly about that.

Q. Mr. Barnard, is it true that a person standing on the back of a farm tractor with the space he could stand on that draw bar also be restricted by the hydraulic lift?

A. Well, he would have to stand between that lift to stand on the draw bar.

Cross Examination.

By Mr. Highsmith:

Q. You knew the Floyd tractor? You had used it?

A. I had used it before, yes.

Q. Is that the picture of it—introduced by the defendant—does that light on the back look in good condition? That looks to be in good condition, doesn't it?

A. It did at that time.

Q. Well, it looks like it has been re-fixed since you knew about it?

A. Yes.

Q. It is a new light on there, since the time you knew the tractor? I say it is a new light on the back of it?

A. Well, it looks like it has been reconditioned some from the way it was at that time.

Q. Yes, sir. From the time you knew the tractor it looks like the light on the rear had been reworked?

A. Yes, sir.

Q. And that is Plaintiffs' Exhibit No. 2 taken of this tractor by the defendant. You weren't particularly looking to see whether Mr. Floyd had a light or not, and you are not telling the jury that he didn't have one, are you? As far as you knew, he could or could not have had one? You weren't looking for that, were you?

A. Well, when I first seen the tractor turning in across in front of me, you see, why I glanced at the side. I knew he had the headlights on, but with all of those porch lights there, I didn't slow down to look at it, but I knew it was a tractor, so I had to watch my side of the road, as I was fixing to go on around the curve, and there was one meeting me and I didn't want to get in a jam.

Q. I asked you, you don't know whether he had his light on the rear or not, do you?

A. No. I wouldn't swear that he did or did not.

Q. That was what I wanted. Do you use this hard surface road?

A. Yes, sir, I do, a right smart.

Q. And do you use that dirt road back there?

A. Yes, sir.

Q. You used that, but you also used the highway too, don't you?

A. Yes, sir.

Q. What kind of a truck were you in?
A. A 1947 Ford truck.
Q. You saw this tractor on the road, coming out.
A. Yes, sir.

The Court:
He said he did.

Q. You saw him with your lights, and you didn't have any trouble avoiding hitting him, did you? You passed him safely?
A. There was nothing to keep me from seeing him because I had already seen him turn in front of me, crossing the road.
Q. Did the headlight cast a light in front of the tractor? Did they shine down the road?
A. I didn't notice him after he turned in, because I had already seen him make his turn.
Q. You have driven tractors at night?
A. How is that?
Q. You have driven tractors at night?
A. Yes, sir.
Q. They throw a light out in front of them, don't they?
A. Yes, sir.
Q. Down the road in front of them?
A. Yes, sir.
Q. All right.

The Court:
All right, you may go down. Anything else, Mr. Layne?

Mr. Layne:
I think we have introduced everything in the way of exhibits, but if not, we introduce all of our exhibits that have been marked and identified.

The Court:
All right.

Mr. Highsmith:
I don't know whether that map has been introduced or not, if not, we introduce it.

The Court:
All right, it is all admitted without objections. Anything else from either side?

Mr. Layne:
We have nothing further.

The Court:
Mr. Highsmith?

Mr. Highsmith:
No, sir, we close.

The Court:
All right.

Mr. Sharpe:
Your Honor please, we would like to have the jury retired. We have a motion we would like to make at this time.

The Court:
All right, gentlemen, go to your room.

Note: At this point a motion was made by the defendant, out of the presence and hearing of the jury, as follows:

Mr. Sharpe:

If the Court please, at this time we would like to move for a directed verdict for the defendant on these three grounds; the first one is the death of the deceased has not been proven by competent testimony and it would only be opinionated evidence, that even the husband of the deceased was only with her casually in Augusta and upon the Court's ruling yesterday, ruling out all of the testimony as to hearsay and letters from Augusta, Georgia, does not show that she died as a result of this accident.

The Court:

Didn't the husband testify that he was with her in Augusta and that she died in Augusta? Didn't he testify to that?

Mr. Sharpe:

As I recall he said he was there two days and three nights.

The Court:

Well, he testified that she died as a result of this accident.

Mr. Sharpe:

The only person, under Georgia law, who can make a prognosis, is a medical doctor, and the only exception to that is where you have a Coroner's Inquest and who is the only person who can certify to the cause of death.

The Court:
You said there wasn't any evidence here that she died, didn't you?

Mr. Sharpe:
As a result of this accident.

The Court:
Oh, I think this man testified that he went with her to Augusta, and I think Mr. Highsmith asked him specifically if he went with her, was he with her all the time, and did she have any other accident, and he said no. I think that's sufficient.

Mr. Sharpe:
All right, sir. The second ground is this: Because the allegation of the petition and the undisputed evidence of the plaintiff and the defendant shows that this tractor was not equipped with a red light and it is a violation of the law and negligence per se for a person to drive a motor vehicle, a motor driven vehicle, which would include a tractor along the highway of this state without a red light.

The Court:
What do you say to that, Mr. Highsmith?

Mr. Highsmith:
If Your Honor please, that would be a question of contributory negligence, if any, and whether the jury found that was the proximate cause of the accident.

The Court:
All right. What's your next ground?

Mr. Sharpe:

Because the evidence in this case shows that there was another violation of the law under Code Section 68-1705 (b), which reads as follows: "Every tail lamp upon every vehicle shall be located at a height of not more than 60 inches nor less than 20 inches to be measured as set forth in Section 68-1703 (b), and the testimony, as I recall it, shows that the tail lamp did not—

The Court:

—well, if that was the proximate cause of the injury, of course, the plaintiff could not recover. I will charge the jury the usual charge that the plaintiff could not recover if, by the exercise of ordinary care, he could have avoided it. I am going to charge them that if both were equally negligent he couldn't recover, and I am going to charge them if both were negligent and the plaintiff's negligence exceeded the negligence of the defendant the plaintiff could not recover, and I am going to charge them that if both were negligent but the defendant's negligence exceeded that of the plaintiff the plaintiff could still recover but the damages would be reduced in proportion to the negligence of the plaintiff. I will cover all of that in my charge.

Mr. Highsmith:

I am sure the Court has in mind that the husband's negligence, unless it was the sole and proximate cause of the death of the deceased, would not bar a recovery of the other plaintiffs.

The Court:

Well, of course, the guest is altogether different. The children are suing for the detth of their mother. I will take that up later.

Mr. Layne:

Your Honor, in this case it is evident fom the testimony that Mrs. Floyd also knew that there was no red tail light, and her husband testified that she rode it a number of times and evidently it should have been obvious to her.

The Court:

Well, what's worrying me is a question of law in this case, that even though the husband's negligence caused this injury, whether these children, suing for the death of their mother—of course the negligence of the driver is not imputable to the passengers, no matter if this man was negligent, the question is whether his negligence would be imputable to these children.

Mr. Layne:

Well, that is evidence. I am concerned with the question of law. The negligence of the driver is never imputable to the passenger, as I understand the law.

Mr. Layne:

This was things before the time of the accident that she could have avoided—

The Court:

—of course, if she could have done that, that would be a different proposition. I will go further and say that if she could have apprehended the danger and could by the exercise of ordinary care have avoided it, that would be a different thing. If I was out riding as a passenger and I saw there was going to be a wreck and I could have avoided it by the exercise of ordinary care of course I wouldn't recover. Anyway,

I will take care of that in my charge. I will cover all of that in my charge.

Mr. Ringel:

If she got behind this light and obscured it that would be imputable to her and to—

The Court:

—yes, but the driver—the negligence of the driver would not be imputable to the guests. I think you all will agree with me on that. Anyway, I will cover all of those points in my charge.

Mr. Highsmith:

Just for the record, Your Honor, we make a motion that the Court direct a verdict for the plaintiffs in some amount, leaving the amount to be determined by the jury. In other words, we request the Court to direct that the plaintiffs in this case are entitled to recover some amount.

The Court:

Well, I am going to overrule your motion on the same grounds I overruled Mr. Sharpe's motion. I think all of that is a question of fact for the jury.

(End of Transcript.)

During the concluding argument of Mr. J. H. Highsmith, one of the counsel for the plaintiffs, the following objections were urged by defense counsel, Mr. Phil Ringel:

Mr. Ringel:

Now, if Your Honor please, we move for a mistrial because he is arguing punitive damages.

The Court:
What is that?

Mr. Ringel:
He is asking the jury to return a verdict for the full amount of $165,000.00 because of these large trucks running people off the highway. He stated in substance "We want you to stop these trucks from running the farmers off the highway, and that a verdict for the full amount of $165,000.00 we will think will do it."

Mr. Highsmith:
No, sir. We are not asking for any punitive damages. We are not entitled to any punitive damages. I haven't said a word about punitive damages.

The Court:
Well, lets stick to the facts in the case. We are not trying trucks for running people off highways. Gentlemen of the jury, just disabuse your minds of that.

Mr. Ringel:
We move again for a mistrial on that ground.

The Court:
Well, I overrule you on that ground. Just argue the evidence, Mr. Highsmith.

Mr. Ringel:
Now, if Your Honor please, we again move for a mistrial on the grounds that Mr. Highsmith has gone into the grandchildren.

The Court:

Yes, now you have left the children and getting into the grandchildren.

Mr. Highsmith:

Your Honor, I am not arguing about the grandchildren I would like for the Court to know what I am saying and—

The Court:

I know what you are saying.

Mr. Highsmith:

I would like for it to go in the record as to what I said. I said that the value of a mother to her children extended after the child became grown and had children herself because that mother could help with those children, her grandchildren.

The Court:

Any evidence of that here? What's that got to do with it? I don't think that is exactly fair, Mr. Highsmith.

Mr. Highsmith:

I want to put this in the record. I expect to show by my argument that a mother has a value to her child, even after she has children of her own, because the value of the mother in helping the child with the grandchildren is a valuable service.

The Court:

All right.

Mr. Highsmith:
Are you holding that is not to be considered by the jury?

The Court:
Well, I didn't raise the objection, so I won't take this time out of your argument. But leave all that out about the grandchildren. That hasn't got anything to do with the case. Just stick to the evidence.

Mr. Highsmith:
All right, sir.

Mr. Ringel:
Well, we move again for a mistrial.

The Court:
Well, I will overrule you on that ground.

(End of the Proceedings.)

Order Approving Transcript of Proceedings.

The foregoing 252 pages of typewritten matter are hereby approved as a true and correct transcript of the evidence and proceedings adduced in the trial of the case of Deroy Floyd, Et Al., vs. Complete Auto Transit Company in the United States District Court for the Southern District of Georgia, Brunswick Division, at the March Term, 1956.

Ordered, That Same Be Filed as a part of the record in said case.

This 24 day of August 1956.

F. M. SCARLETT,
Judge, U. S. District Court.

THE CHARGE OF THE COURT.

Filed Aug. 6, 1956.

(Title Omitted.)

Gentlemen of the Jury:

This is a suit for damages of Deroy Floyd and his children for the death of his wife and the mother of his children against the Complete Auto Transit, Inc.

The plaintiffs allege in this suit that the wife and mother of the children, respectively, was killed by the negligence of the defendant's agents and employees, the defendant being the Complete Auto Transit, Inc. The alleged grounds of negligence are set out in the petition in this case.

The defendant, Complete Auto Transit, Inc., have filed their answer in which they state that they are not responsible for this death and for the reasons as stated in their answer in this case.

Now, this petition and answer will be out with you, not as evidence, but for you to read over and get the respective contentions of the respective parties, if you so desire.

Now, I am going to take up first, briefly, because there is some difference in the liability, if any, of the defendant company as to Deroy Floyd and to his children. So, I am going to take up first the rights and liabilities, if any, of the plaintiff, Deroy Floyd, and then I will come to the children next. Of course, you will understand it is all in one suit. In other words, a husband and/or child, or children may recover for the homicide of the wife and mother and those surviving at the time the action is brought and shall sue jointly and not separately, with the right to recover

the full value of the life of the decedent, as shown by the evidence, and with the right of survivorship as to said suit, if either shall die pending the action. In other words, as I say, it is just one suit by this husband and children of this lady who was killed in an accident or collision near Hazlehurst, Georgia, sometime in July, 1955. The plaintiffs contend that this lady was killed by the negligence of the defendant company. The defendant company denies it and says that it is not so, that the lady was not killed through any acts of negligence on the part of the defendant company, the Complete Auto Transit, Inc. Now, as I said, that is a brief summary of the case before you. First, I am going to take up the husband's rights and liabilities, if any, and then I will come back to the children's rights and liabilities.

Now, I charge you, gentlemen of the jury, that it is necessary that the plaintiff in this case establish the facts to which he is entitled to recover in the case by a preponderance of the testimony, and by a preponderance of the evidence is meant that superior weight of evidence upon the issues involved which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

In determining where the preponderance of the evidence lies in this case you may consider the number of witnesses, although the preponderance of the evidence does not necessarily lie with the greater number of witnesses. You may take into consideration the witnesses' demeanor on the witness stand, their interest, or the want of interest, or any other fact or circumstance that may legitimately appear to you from the witnesses' demeanor on the witness stand.

I will charge you first as to ordinary care. Ordinary care is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances. The absence of ordinary care is commonly denominated as ordinary negligence.

I charge you, gentlemen of the jury, that a witness may be impeached in several different ways. Among them would be proof of contradictory or inconsistent statements about a material fact. Whether such a witness has been impeached or not, is a question for the jury to determine because, as I stated, you are the sole judges of the credibility of the witnesses who have testified in your presence.

I charge you that if you believe that a witness has been impeached, wholly impeached and unworthy of belief, they would be authorized to discard his entire testimony; or, if the jury think he has been impeached in part and sustained in part, the jury may accept whatever portion of the evidence they believe and discard that which they disbelieve. It all goes back to the same thing, gentlemen of the jury, that you are the sole judges of the credibility of the witnesses.

Now, gentlemen, in case of conflicts in the evidence, and there are usually conflicts in contested cases, it is the duty of the jury, if it can do so, to reconcile the conflicts without imputing perjury to anybody, to any witness, reconciling them in any manner that you can consistently do so; but, if you cannot reconcile them, if you are unable to reconcile conflicts, if any, in the testimony, then it is for the jury to say what witness and what evidence you will believe and what witness or evidence you will disbelieve. That is a matter that is solely within the province of the jury.

Now, gentlemen of the Jury, in approaching this

case before you, the first thing that the jury should address itself to would be to determine whether or not in this case the defendant company, Complete Auto Transit, Inc., is guilty of any one or more of the acts of negligence as stated in this petition.

If, upon a consideration of the evidence, you find that the defendant has not committed any act of negligence, why, then your deliberations would stop right there, because the defendant would not be liable.

If you find, gentlemen of the jury, from the evidence in this case, that the defendant is guilty of one or more acts of negligence, then you would ascertain whether or not the plaintiff, Deroy Floyd, in this case could have, by the exercise of ordinary care on his part, discovered the negligence of the defendant company, if any, and have avoided the injury. If you find that he could have done that, then you would stop right there, because the plaintiff, Deroy Floyd, would not be entitled to recover, and the defendant company would be entitled to a verdict. In other words, gentlemen of the jury, if this defendant company was guilty of one or more acts of negligence, as set out in this petition, but if the plaintiff, this husband, Deroy Floyd, could have avoided this accident and injury, why, he could not recover.

I charge you further, gentlemen of the jury, that if you find that there were some acts of negligence committed and that the plaintiff could not, by the exercise of ordinary care and diligence, have discovered the negligence, if any, and have avoided the injury to himself, then you would go further, and ascertain whether or not such act or acts of negligence, if any, on the part of the defendant company, were the proximate cause of this collision. In other words, the defendant company might be guilty of one or

more acts of negligence, as alleged in the petition, but if it was not the proximate cause of the accident and injury, why, then of course the defendant company would not be liable and the plaintiff could not recover. In other words, if the negligence of the defendant company, if you find it was negligent, was not the proximate cause of the injury and damage, why, then of course the plaintiff would not be entitled to recover.

Now, gentlemen of the jury, if you find from the evidence that both the plaintiff, Deroy Floyd, and the defendant company were negligent, and you find that the negligence of the plaintiff was equal to or greater than that of the defendant company then the plaintiff could not recover.

Now, gentlemen, if you find that both the plaintiff and the defendant were negligent, but you find that the plaintiff was less negligent than the defendant, that is, that the defendant was more negligent than the plaintiff, the plaintiff would still be entitled to recover, but the amount of recovery would be reduced in proportion to the amount of fault attributable to the plaintiff.

Now, gentlemen of the jury, if you find that the plaintiff is entitled to recover, then the next question that would present itself would be the question of damages.

I charge you, gentlemen of the jury, that a husband or children may recover for the homicide of a wife or mother the full value of her life, as shown by the evidence. The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had she lived. The value of the life of a wife and mother

is not determined solely from the evidence as to the amount of wages which the decedent may have earned as a worker for wages, or the actual domestic services which she may have performed in the home for the benefit of her husband and children. In estimating the value of her services she is not to be considered as an ordinary servant or as a mere hireling. In her position as a wife or mother in which she performs services of a pecuniary nature, which are not capable of exact proof, the jury may take into consideration what may be the value of her services incapable of exact proof in the light of their own observation and experience.

I charge you that the full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had she lived. I charge you further that in arriving at the gross sum that the decedent would have earned to the end of her life you will take into consideration all the facts and circumstances which the evidence may disclose as to the value.

If the jury should find that the plaintiff is entitled to recover, it would be their duty to first determine the gross value of the life of the decedent, and then to reduce that sum to its present value, using as a basis of reduction seven percent per annum as the legal value of money in Georgia.

To illustrate: $100.00 due and payable today is worth $100.00 today. $100.00 due and payable one year from today would be worth today only that sum to which when you add seven percent per annum for one year would, principal and interest together, make $100.00.

To carry the illustration one step farther: $100.00 due and payable two years from today would not be worth $100.00 today. Neither would it be worth as much as $100.00 due and payable one year from today. It would be worth today only that sum to which when you add seven percent per annum for two years, would, principal and interest together make $100.00.

That is the principle by which unearned earnings extending into the future, should be reduced to its present value.

The Court:

Now, I think it was agreed that the expectancy of this deceased's life was 28.87, wasn't it?

Mr. Highsmith:

Yes, sir.

The Court:

All right. In other words, gentlemen of the jury, that doesn't mean that she would live that long. It means that she might die sooner, or she might live longer, but you can use that method and determine her expectancy in life if you so desire. In other words, it cannot be assumed that the expectation in life of the decedent at the time of her death was that of an average person. It may have been more, or it may have been less. What it was is a question for the jury to determine. In doing so the jury should look to the evidence, consider her age, habits of life, the state of her health, and any and all other facts which might reasonably tend to indicate her probable expectation in life at the time of her death. In other words, you may look to the evidence as to her age and her health and arrive at how long you think she

might live, what would be the duration of her life, taking into account the various factors that you know as intelligent, mature men, that enter into the questions of life and death, using the mortality tables—No, that wasn't introduced. I won't go any further with that.

Now, gentlemen, that is substantially the case as to the husband, if he has one. Now, I come next to the case of the children, if they have a case.

As I said before, in the charge to you relative to the husband, you will have the petition of the plaintiffs and the answer of the defendants out with you and you may read them over, if you so desire, to determine the exact contentions of the respective parties. However, the pleadings in the case are not evidence and are not to be considered as evidence by the jury. They merely set forth the contentions of the respective parties.

You will also consider the preponderance of evidence that I charged you before relative to the husband. There is no difference in that, in that the children have to prove their case by a preponderance of the evidence. Also the charge with reference to conflicts in testimony applies in the childrens' case as well as in the husband's case.

I charge you in a case of this kind, gentlemen of the jury, that the childrens' mother is not bound by any act of negligence on the part of the driver of the car or motor vehicle. That is the husband. She was not bound by any act of negligence on his part, as she was a guest. You will not be called upon to determine, as you would have to do if the driver of the automobile was filing this suit, whether he would be prevented from recovering on account of his own negligence. The plaintiffs' mother in this case was

not the driver of the automobile, but was riding in the car with her husband, who was driving, and therefore in this case the plaintiffs' mother would not be responsible for an act of negligence on the part of the driver of the car and would not be bound by it.

The only respect in which the plaintiffs' mother owed a duty here of exercising care was that if the circumstances existed at the time demanded that she take some measure to prevent injury to herself and under the circumstances could have done so, then it would have been her duty to do so; and if she failed to do it, she would be charged with negligence herself in not exercising ordinary care for her own protection. I have already charged you what ordinary care was. But whether the circumstances were such at the time as to make it possible for her to prevent an injury by the exercise of ordinary care would be for this jury to say under the circumstances as shown by the evidence.

I charge you that if the defendant was not negligent in any of these respects as set out in the petition, then the plaintiffs, these children, would not be entitled to recover, even though the mother may have been killed.

I charge you further that if the plaintiffs' mother and the defendant company were equally guilty of negligence, or if the plaintiffs' mother's negligence was greater than that of the defendant company, then the plaintiffs could not recover.

I charge you further that if the plaintiffs' mother was negligent and the defendant company was negligent, if they both were negligent, but you find that the defendant company was more negligent than the plaintiffs' mother, the plaintiffs, the children, would still be entitled to recover, but the amount of

recovery would be reduced in proportion to the amount of fault or negligence attributable to the plaintiffs' mother.

I charge you further that the same rules which I have given you in charge as to the value of the life of the mother would be applicable to the children as well as to the husband.

I charge you that whenever a motor vehicle is being operated on a public highway at anytime from a half hour after sunset to half hour before sunrise and at any other time when there is not sufficient visibility to render clearly discernible persons and vehicles on the highway at a distance of 500 feet ahead the driver shall use a distribution of lights of composite beams directed high enough and with sufficient intensity to reveal persons or vehicles at a distance of at least 350 feet ahead when not approaching an oncoming vehicle and a distance of at least a 100 feet when approaching an oncoming vehicle and in 500 feet of such oncoming vehicle.

I charge you that no person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

It shall be unlawful for a motor vehicle to be operated on a public highway at anytime between one hour after sunset and one hour before sunrise at a speed greater than 50 miles per hour.

The driver of a vehicle on a public highway overtaking another vehicle proceeding in the same direc-

tion shall pass to the left thereof at a safe distance and shall not again drive to the right of the roadway until safely clear of the overtaken vehicle.

I charge you that it is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any street or highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in sections 68-1701 through 68-1722, or which is equipped in any manner in violation of said sections, or for any person to do any act forbidden or fail to perform any act required under said sections.

I charge you that the laws of the state of Georgia requires that every farm tractor equipped with an electric lighting system when upon the highways at anytime from a half hour after sunset to a half hour before sunrise shall at all times display a red tail light. The law also requires a display of road lighting equipment commonly called tail lights. I charge you that every tail lamp upon every vehicle shall be located at a height of not more than 60 inches nor less than 20 inches to be measured as set forth in section 68-1703 (b) of the Code of Georgia. Whenever requirement is hereinafter declared as to the mounted height of lamps or devices it shall mean from the center of such lamp or device to the level ground upon which the vehicle stands when such vehicle is without a load.

I charge you that every motor vehicle, trailer, semitrailer, and pole trailer, and any other vehicle which is being drawn at the end of a train of vehicles, shall

be equipped with at least one tail lamp mounted on the rear, which when lighted as hereinbefore required, shall emit a red light plainly visible from a distance of 500 feet to the rear, provided that in the case of a train of vehicles only the tail lamp on the rearmost vehicle need actually be seen from the distance specified.

I don't think that would be applicable in this case because there was no train of vehicles. Isn't that right?

Mr. Layne:
Yes, sir.

The Court:
All right. Every new motor vehicle hereafter sold and operated upon a highway other than a truck tractor, shall carry on the rear, either as a part of the tail lamps or separately, two red reflectors—Now, this was a truck trailer, wasn't it. It says other than a truck trailer.

Mr. Layne:
Sir?

The Court:
You gave me a request to charge that every motor vehicle hereafter sold and operated upon a highway other than a truck tractor—now, was this a truck tractor?

Mr. Layne:
It was a farm tractor.

The Court:

All right—shall carry on the rear, either as a part of the tail lamps or separately, two red reflectors, except that every motorcycle and every motor driven cycle shall carry at least one reflector, meeting the requirements of this section.

Every such reflector shall be mounted on the vehicle at a height not less than 20 inches nor more than 60 inches measured as set forth in section 68-1703 (b) and shall be of such size and characteristics and so mounted as to be visible at night from all distances within 300 feet to 50 feet from the rear of such vehicle except that visibility from the greater distance is hereinafter required of reflectors on certain types of vehicles.

I charge you that under the laws of the State of Georgia a farm tractor is a motor vehicle and its use on the highway is governed by the traffic laws of the State of Georgia.

I charge you that no person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law.

I charge you that from and after the date of approval of this law it shall be unlawful for any person to sell any new motor vehicle, including any motorcycle or motor-driven cycle, in this state or for any person to drive such vehicle on the highways unless it is equipped with at least one stop lamp meeting the requirements of the law.

Any motor vehicle may be equipped and when required under this law shall be equipped with the following signal lamps or devices; A stop lamp on the rear which shall emit a red or yellow light and which

shall be actuated upon application of the service (foot) brake and which may but need not be incorporated with a tail lamp.

Every stop lamp shall be plainly visible and understandable from a distance of 100 feet to the rear both during normal sunlight and at nighttime and every signal lamp or lamps indicating intention to turn shall be visible and understandable during daytime and nighttime from a distance of 100 feet both to the front and rear. When a vehicle is equipped with a stop lamp or other signal lamps, such lamp or lamps shall at all times be maintained in good working condition. No stop lamp or signal lamp shall project a glaring or dazzling light.

I charge you, gentlemen of the jury, that where no special hazards exist that require lower speed for compliance with subdivision (a) of this section the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be lawful.

60 miles per hour from one-half hour before sunrise until one-half hour after sunset. At other times 50 miles per hour.

Now, gentlemen of the jury, if you find under the rules of law as given you in charge and from the evidence in the case that the plaintiffs have not carried the burden, as required by law, then you should find for the defendant and the form of your verdict would simply be: "We, the jury, find for the defendant." However, on the other hand, if you find from the evidence and the rules of law as given you in charge that the plaintiffs have carried the burden by a preponderance of the evidence, I charge you

that in an action brought jointly by a husband and his children to recover damages for the alleged tortuous death of his wife and mother of the partics respective, where the negligence of the husband and the defendant combine to proximately cause the death of the wife and mother who could not afford the consequences of the negligence of the husband and defendant and who is in no way guilty of any negligence a recovery as to both of the plaintiffs is not barred by the negligence of the husband where his negligence is equal or greater than that of the defendant. I think I charged you that in substance just now. However, a recovery in such circumstances is barred as to the husband, that is where his negligence is equal to or greater than that of the defendant. In such a case a child is not entitled to recover the full value of the life of the mother. Where the husband's negligence is less than the defendant both plaintiffs are jointly entitled to a verdict.—That's the husband and the children—for the full value of the life of the wife and mother, diminished in proportion to the husband's negligence, unless by the exercise of ordinary care the husband could have avoided the consequence of the defendant's negligence. The husband and child's portion, however, is to be separately stated in the verdict, a child's part not to be less than half the value of the mother's life. In such a situation the amount of recovery to which the plaintiffs are entitled to are appropriated between the husband and wife, the child's part being one-half the value of the life of the mother. Now, this is where there is one child involved, the husband's part being one-half the value of his wife's life, the husband's half of such value being diminished in proportion to his negligence, the husband's right to a portion of the

recovery becomes subject to the provisions, first, that his negligence was less than that of the defendant, and second, that by the exercise of ordinary care he could not have prevented the homicide of his wife. In other words, if the husband and children are entitled to recover the full value of the wife and mother the form of your verdict would be: "We, the jury, find for the plaintiffs in the sum of so many dollars." If you should find that the negligence of the husband was less than that of the negligence of the defendant then you should find for the plaintiff, the husband, one-eleventh of what you think the value of the wife was, deducting therefrom the amount of negligence which you think is attributable to him. But, if you find, gentlemen of the jury, that the husband should not recover but that the children should recover then the form of your verdict would be, "We, the jury, find for the plaintiffs, the children, and not the husband, the sum of blank dollars, which would be ten-elevenths of what you think the life of the mother was worth.

The Court:
Is there any exceptions to that apportioning of the value of the life of the wife and mother, gentlemen?

Mr. Layne:
No, sir.

Mr. Highsmith:
No, sir.

The Court:
All right, let the record show there were no exceptions.

Now, gentlemen of the jury, I charge you that if the husband was acting under the directions of the wife and mother, doing some work for her, doing something for her—well, I will charge you in plain language: If the wife was not a guest and if the husband, at her request, was taking her to a telephone to inquire about her brother and he was her agent and was on a mission at her request and direction—I don't know whether she was giving directions or not, was she?

Mr. Layne:

We think it is a proper charge.

The Court:

All right, then I charge you, gentlemen, that the wife would not be a guest if her husband, at her request, was taking her to a telephone to inquire about her brother, and he was her agent and was on a mission at her request and directions for her benefit, then she would not be a guest under the law which I have just charged you relative to a guest.

Now, after all, gentlemen of the jury, the word "verdict" is derived from two Latin words, which means the truth, and that is what you are sworn to find, the truth, that is as to whether or not the plaintiffs have stablished their contentions by a preponderance of the evidence that this defendant was negligent and whether the negligence of the defendant caused this woman's death. If you find that to be the truth of the case, from the evidence in the case and the rules of law which I have given you in charge, then you should find for the plaintiffs If you find they have not done so under the evidence and the rules of law as given you in charge, then it would be equally

your duty to find a verdict in favor of the defendant.

Now, if you have any trouble in the wording of your verdict, you may just bring it into Court orally and tell me what you have found and I will have your verdict put in proper form.

Now, there is some documentary evidence that will go out with you and you will give that the same weight and credit as you give the other evidence in the case. Now, you may retire, but do not begin upon your deliberations until I send you word to do so.

Of course, gentlemen, one other thing: You will understand that one operating a motor vehicle on the highway is not required to anticipate that others on the highway will violate the law. You may retire but do not begin your deliberations until I send you word and send you the documentary evidence.

The Court:
Any exceptions, gentlemen?

Mr. Highsmith:
No, sir.

The Court:
Mr. Sharpe?

Mr. Sharpe:
No, sir.

The Court:
All right, tell the jury to begin their deliberations, Mr. Marshal, and also give them the documentary evidence.

Note: Upon request from the jury, the following additional instructions were given:

The Foreman:

Your Honor, in our brief deliberation and discussion of this case this question has been asked: If the jury should find that the children are entitled to damages, and should the jury find damages, would the jury have to award the same number of dollars, as damages, to—I believe the children ranged in ages up to 25 years and down to four years—or would it be within the authority and jurisdiction of the jury to make some difference in the amount of damages—we will say to the minor children?

The Court:

Rather than to the ones that have reached their majority. I don't think you could do that, because if one child is entitled to recover all are entitled to recover.

The Foreman:

If they all are entitled to recover, all are entitled to recover the same amount?

The Court:

Yes, I would think so. In other words, you couldn't make any distinction. If one is entitled to recover, all are entitled to recover the same amount.

The Foreman:

Thank you, sir.

The Court:

Any exceptions to that, Mr. Highsmith?

Mr. Highsmith:

No, sir.

The Court:
Mr. Layne?

Mr. Layne:
No, sir.

The Court:
All right, let the record show that there were no exceptions.

(End of Charge.)

Order Approving Charge of the Court.

The foregoing 21 pages of typewritten matter are hereby approved as a true and correct transcript of the charge of the Court as delivered in the trial of the case of Deroy Floyd, et al., vs. Complete Auto Transit, Inc., in the United States District Court for the Southern District of Georgia, Brunswick Division, March Term, 1956.

Ordered, that same be filed as a part of the record in said case.

This 24 day of August 1956.

F. M. SCARLETT,
Judge U. S. District Court.

In the District Court of the United States for the Southern District of Georgia, Brunswick Division.

I, EUGENE F. EDWARDS, Clerk, of the United States District Court in and for the Southern District of Georgia, do hereby certify that the foregoing is a true, correct and complete transcript of the record of proceedings had in this Court in the Civil Action Case No. 416, wherein Complete Auto Transit, Inc., is Defendant Appellant, and Deroy Floyd, et al., Plaintiff Appellee, said transcript containing all parts of the record and proceedings had in said cause, as directed by law to be made and as may be necessary upon the review of the cause.

In Witness Hereof, I have hereunto set my hand and affixed the seal of this Court, at Brunswick, Georgia, this the 5th day of December, 1956.

EUGENE F. EDWARDS,
Clerk,
By MARY R. CROSS,
Deputy Clerk.

(Seal)

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAR 3 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 825

DEROY FLOYD, FRANCES FLOYD DYAL, IRENE FLOYD WILLIAMS, and W. D. FLOYD, ROBBY RAY FLOYD, BOBBY GENE FLOYD, DAVID EARL FLOYD, JAMES PRICE FLOYD, HAZEL FLOYD, J. E. FLOYD and JO ANN FLOYD, minors, by and through their next of friend, their father, DEROY FLOYD, PETITIONERS,

versus

COMPLETE AUTO TRANSIT, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY HAMMER,
Columbia, South Carolina,
HENRY H. EDENS,
Columbia, South Carolina,
J. H. HIGHSMITH
Baxley, Georgia,
GORDON KNOX, JR.,
Hazelhurst, Georgia,
E. WAY HIGHSMITH,
Brunswick, Georgia,
LAMAR W. SIZEMORE,
Atlanta, Georgia,
Attorneys for Petitioners.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	3
Reasons for Granting the Writ	5
(1) There is an existing conflict among the Circuits on the issues presented	5
(2) The decision herein violates the 7th Amendment and is not in accord with applicable decisions of this Court	9
(3) The action of the Court below constituted an invasion of the province of the jury and usurpation of the prerogative of the trial judge and is in direct conflict with Neese v. Southern Ry. Co., 350 U. S. 77	11
Conclusion	18
Appendix	19
Index to Appendix	20

CITATIONS

	Page
Accardi v. Shaughnessy, 347 U. S. 260	16
Affolder v. New York, C. & St. L. R. Co., 339 U. S. 96	7, 8, 10
Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69	9
Atlantic Coast Line v. Wells, 78 Ga. App. 589, 53 S. E. (2d) 496	12
Blue's Truck Line, Inc., v. Harwell, 59 Ga. App. 305, 200 S. E. 500	4, 12
Bucher v. Krause, 200 F. (2d) 576	8
Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494	7
Chicago, Rock Island & Pacific R. Co. v. Kifer (C. A. 10), 216 F. (2d) 753	7, 8
Chicago, Rock Island & Pacific R. Co. v. Williams, 245 F. (2d) 397	8
City of Lincoln v. Power, 151 U. S. 437	9, 10
Cobb v. Lepisto, 6 F. (2d) 128	6, 10
Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359	9
Fairmont Glass Works v. Cub Fork Coal Co., 287 U. S. 474	7, 9, 16
Frasier v. Public Service Interstate Transportation Co. (C. A. 2), 244 F. (2d) 668	12
Glenwood Irrigation Co. v. Vallery (C. C. A. 8), 248 F. 483	7
Herencia v. Guzman, 219 U. S. 44	9
Langnes v. Green, 282 U. S. 531	16
Lebeck v. William A. Jarvis, Inc., 250 F. (2d) 285	8, 12
Lewis v. Williams, 78 Ga. App. 494, 51 S. E. (2d) 532	3
Lithgow v. Hamilton (Fla.), 69 So. (2d) 776	12
Miller v. Maryland Casualty Co., 40 F. (2d) 463	6, 8
Neese v. Southern Ry. Co., 350 U. S. 77	11, 17
New York Central and H. R. R. Co. v. Fraloff, 100 U. S. 24	9, 17

CITATIONS—Continued

	Page
N. Y. Lake Erie and Western R. Co. v. Wintor, 143 U. S. 60	9
New York, N. H. & H. R. Co. v. Zermani, 200 F. (2d) 240	8
Parsons v. Bedford, 3 Pet. 433	9
Peeler v. Central of Georgia Ry. Co., 163 Ga. 784 (2d), 137 S. E. 24	4
Pollard v. Kent, 59 Ga. App. 118, 200 S. E. 542	4
Powers v. Wilson, 110 F. (2d) 960	8
Rankin v. Shayne Bros., Inc., 234 F. (2d) 35	8
Snyder v. U. S., 350 U. S. 906	17
Southern Pac. Co. v. Guthrie, 186 F. (2d) 926	6, 10
Southern Railway-Carolina Div. v. Bennett, 233 U. S. 80	7, 9
Spero-Nelson v. Brown, 175 F. (2d) 86	8
Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S. E. 69	4
Stevenson v. Hearst Consol. Publications (C. A. 2), 214 F. (2d) 902	7, 8, 10
St. Louis Southwestern R. Co. v. Ferguson (C. A. 8), 182 F. (2d) 949	8, 10
The Abbotsford v. Johnson, 98 U. S. 440	9, 10
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54	6, 7
United Press Asso. v. National Newspaper Asso. (C. C. A. 8), 254 F. 284	7
U. S. v. Socony, 310 U. S. 150, 247	7
Virginia Ry. Co. v. Armentrout (C. A. 9), 166 F. (2d) 400	6
Weathersbee v. Elgin, Joliet and Eastern Ry. Co. (7th Cir.), 191 F. (2d) 302	5, 8
Whiteman v. Petrie, 220 F. (2d) 914	5

OTHER REFERENCES

Georgia Code, Section 105-1306	2
Georgia Code, Section 105-1308	3
7th Amendment, U. S. Constitution	2
28 U. S. C. 1254	2

Supreme Court of the United States

October Term, 1957

No._____

DEROY FLOYD, FRANCES FLOYD DYAL, IRENE FLOYD WILLIAMS, and W. D. FLOYD, ROBBY RAY FLOYD, BOBBY GENE FLOYD, DAVID EARL FLOYD, JAMES PRICE FLOYD, HAZEL FLOYD, J. E. FLOYD and JO ANN FLOYD, minors, by and through their next of friend, their father, DEROY FLOYD, PETITIONERS,

versus

COMPLETE AUTO TRANSIT, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners pray that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, dated and entered in this case on November 13, 1957.

OPINIONS BELOW

The opinion of the District Court (App. 21) is unreported. The opinion of the Court of Appeals (App. 26) is reported in 249 F. (2d) 396, and its opinion on petition for rehearing (App. 41) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1957 (App. 32). Petition for rehearing (App. 33) was denied on January 14, 1958 (App. 34). The

jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Did the Court of Appeals have the power under the constitutional limitation of the Seventh Amendment to review the question of alleged excessiveness of the jury verdict in a tort action for unliquidated damages not ascertainable with mathematical certainty and resting upon inabsolute elements?

2. May the Court of Appeals, assuming it has appellate power to review the denial by the trial judge of a motion for a new trial on the ground that the verdict was excessive, disturb such action of the trial judge which was not without support in the record?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

Georgia Code Section 105-1306:

> "Homicide of wife or mother—The husband may recover for the homicide of his wife, and if she leaves child or children surviving, the husband and children shall sue jointly and not separately with the right to recover the full value of the life of the decedent, as shown by the evidence, and with the right of survivorship as to said suit, if either shall die pending the action."

Georgia Code Section 105-1308:

> "Full value of life of decedent, as shown by the evidence defined—The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived."

STATEMENT

Petitioners, residents of Georgia, surviving husband and ten children of Mamie M. Floyd, deceased, brought suit under the wrongful death statute of Georgia, Code Section 105-1306, to recover damages against respondent, a Michigan Corporation, for the negligence of its employee and servant in the operation of one of its tractor trailer vehicles while proceeding along a highway in Georgia, as the result of which the tractor trailer of respondent overtook and struck a farm tractor upon which Mrs. Floyd was riding, causing her to be thrown therefrom to the ground and to sustain injuries from which she died on August 2, 1955. At the time of her death, Mrs. Floyd was 39 years of age.

The jury brought in a verdict of $107,500.00 in favor of petitioners upon which judgment was entered. Upon consideration of respondent's motion for new trial, the District Court denied same, whereupon the respondent appealed to the Court below.

On appeal, the Court below reversed as to the issue of damages solely "upon the ground that the court below (District Court) abused its discretion in refusing to set the verdict aside as excessive", without pointing out any specification of abuse.

The cause of action for death under the applicable Code Section 105-1306 "is jointly given to the husband and children surviving at the time the action is brought, irrespective of the age of the children and questions of dependency and contribution. *Lewis v. Williams*, 78 Ga. App.

494, 51 S. E. (2d) 532; *Peeler v. Central of Georgia Ry. Co.*, 163 Ga. 784 (2d), 137 S. E. 24.

The damages recoverable by the husband and children surviving, as beneficiaries under the Code, are the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had she lived, Georgia Code Section 105-1308, which include (1) the present cash value of the future earnings of deceased during her life expectancy had she lived and (2) the present cash value to each of the beneficiaries of the loss of the future services the deceased would have rendered as a wife and mother during her life expectancy had it not been for her untimely death, assessed by the jury "in the light of their own observation and experience and to the satisfaction of their own consciences." *Pollard v. Kent*, 59 Ga. App. 118, 200 S. E. 542; *Standard Oil Co. v. Reagan*, 15 Ga App. 571, 84 S. E. 69, and "gross mistake or undue prejudice or bias" can not be inferred merely from the size of the verdict, *Blue's Truck Line, Inc., v. Harwell*, 59 Ga. App. 305, 200 S. E. 500.

That the value of the domestic services which a decedent would have performed as a wife and mother during her life expectancy had she lived is not ascertainable with mathematical certainty and rests upon inabsolute elements is manifest from the decision of the Court below wherein it states that the privilege of having the wife and mother in the home, an element of damages, is "not readily evaluated by dollar standards" and that "the value of domestic services rendered by a wife could include 'the value of many services incapable of exact proof.' " And in *Standard Oil Co. v. Regan, supra*, the Georgia Court stated "that there need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any period of time, or of any aggregate sum."

The amount of damages assessed by the jury was supported by the evidence of record showing (1) the earning capacity of deceased, (2) her age at the time of death, (3) her probable life expectancy, (4) the habits, disposition and proclivities of the deceased to her husband and ten children, to wit, her tender ministrations, unselfish devotion and countless loving services, the manual work performed by her on the family farm and the work performed in and about the house, consisting, *inter alia*, of making beds, cooking, washing, ironing, patching clothes, mopping and yard sweeping (R. 162-166).

REASONS FOR GRANTING THE WRIT

1. **Existing conflict among the Circuits on the issues presented:** The issues in this case are (1) whether, in tort actions for wrongful death where the damages recoverable are not ascertainable with mathematical certainty and rest upon inabsolute elements, federal appellate courts have the power to review for error of fact the question of the excessiveness or inadequacy of jury verdicts, and (2) assuming that such power exists, whether a federal appellate court may disturb the action of trial judge refusing to grant a motion for a new trial made on the ground that the verdict is excessive where such action of the trial judge is not without support in the record.

On the first issue clearly there is an existing conflict among the Circuits. *Weathersbee v. Elgin, Joliet and Eastern Ry. Co.*, (7th Cir.), 191 F. (2d) 302.

Other than the 5th Circuit, *Whiteman v. Petrie*, 220 F. (2d) 914, the only other Circuits holding that federal appellate courts are empowered to review the question of the excessiveness of damages in a tort action where the damages are not ascertainable with mathematical certainty and rest upon inabsolute elements are the 4th Circuit, Vir-

ginia Ry. Co. v. Armentrout, 166 F. (2d) 400 and the 9th Circuit, *Cobb v. Lepisto,* 6 F. (2d) 128. But the latter Circuit in *Southern Pac. Co. v. Guthrie,* 186 F. (2d) 926, although it concluded that the verdict was too high, held that it could not reverse the action of the District Court in denying motion for new trial made on the ground that the verdict was too high. The correctness of its holding in *Cobb v. Lepisto, supra,* was therein considered, and in the concurring opinion of Judge Bone it was stated that the *Lepisto case* should be specifically overruled because "the doctrine of that old case lacks support in pronouncements of the Supreme Court and only one Circuit seems to have relied on it as authority for the principle that a federal appellate court may arbitrarily reduce the size of a verdict merely because it regards it as excessive."

In undertaking to review the question of excessiveness of damages, the 5th, 4th and 9th Circuits, recognizing the impact of the decisions of the United States Supreme Court and other federal appellate courts, seek to justify their right to review this question by the "scholastic refinement" of treating it as a review of whether there has been an abuse of discretion by the trial judge in refusing to set aside the verdict by the jury. On this point, Judge Learned Hand, speaking for the Court of Appeals for the 2nd Circuit in *Miller v. Maryland Casualty Co.,* 40 F. (2d) 463, disapproved as impracticable the rule that federal appellate courts have power to review the question of excessiveness of damages by the "scholastic refinement" of changing its name to a review of whether there has been an abuse of discretion. Just as this Court, in *Tiller v. Atlantic Coast Line R. Co.,* 318 U. S. 54, reasoned and concluded that under the Federal Employers' Liability Act the lower court cannot permit the defense of "assumption of risk" by changing its name to "non-negligence," so likewise in the case at bar, in accordance with the long and unbroken line of de-

cisions that federal appellate courts cannot review the question of excessiveness of damages, it is respectfully submitted that the Court below should not be permitted to review this question by changing its name to "abuse of discretion." The reasoning of this Court in the *Tiller case* applies with equal force in the instant case.

If a refusal by a trial judge to grant a motion for new trial made on the ground that the damages are excessive or inadequate may ever be reviewed by appellate courts on the ground that the trial judge abused his discretion, it could only be reviewed under the circumstances noted in *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 483, 484; namely, when the amount of damages exceeds a statutory limit, *Southern Railway-Carolina Div. v. Bennett*, 233 U. S. 80; or is more or less than an undisputed amount, *Glenwood Irrigation Co. v. Vallery*, (C. C. A. 8) 248 Fed. 483; or is in pursuance of erroneous instructions on the measure of damages, *Chesapeake & Ohio R. C. v. Gainey*, 241 U. S. 494; or is in clear contravention of the instructions of the trial court, *United Press Asso. v. National Newspaper Asso.*, (C. C. A. 8) 254 F. 284; or the verdict is the result of passion, prejudice or caprice, *Chicago, Rock Island & Pacific R. Co. v. Kifer*, (C. A. 10) 216 F. (2d) 753, 756, 757. None of these circumstances is present in the case at bar. Compare *U. S. v. Socony*, 310 U. S. 150, 247, and *Stevenson v. Hearst Consol. Publications*, (C. A. 2), 214 F. (2d) 902, 911, 912.

Nor does the *dicta* comment by this Court in *Affolder v. New York, C. & St. L. R. Co.*, 339 U. S. 96, lend support to any implication that the question of excessiveness of damages is subject to review by federal appellate courts, as such an interpretation would do violence to the 7th Amendment to the United States Constitution.

Moreover, the question of excessiveness of damages was not considered by the Court of Appeals in the *Affolder case*

and thus the comment by this Court could not support any implication that such question may be reviewed. Additionally, the word "monstrous" used by this Court in the *Affolder case* was part of a "quotation" taken from Carrington, K. B., 2 Wilson 244, 24 Eng. Rep. 790, which laid down the standard for granting or denying a motion for a new trial by the trial judge, and had no application to the standard to be applied in appellate review, *St. Louis Southwestern R. Co. v. Ferguson*, (C. A. 8), 182 F. (2d) 949, 955.

In direct conflict with the 5th, 4th and 9th Circuits on both issues herein involved are the following Circuits:

First Circuit: *New York, N. H. & H. R. Co. v. Zermani*, 200 F. (2d) 240;

Second Circuit: *Miller v. Maryland Casualty Co.*, 40 F. (2d) 463; *Powers v. Wilson*, 110 F. (2d) 960; *Stevens v. Hearst Consol. Publications*, 214 F. (2d) 902;

Third Circuit: *Lubeck v. William A. Jarvis, Inc.*, 250 F. (2d) 285;

District of Columbia Circuit: *Rankin v. Shayne Bros. Inc.*, 234 F. (2d) 35;

Sixth Circuit: *Spero-Nelson v. Brown*, 175 F. (2d) 86;

Seventh Circuit: *Weathersbee v. Elgin, Joliet and Eastern Ry. Co.*, 191 F. (2d) 302; *Bucher v. Krause*, 200 F. (2d) 576:

Eighth Circuit: *St. Louis Southwestern Ry Co. v. Ferguson*, 182 F. (2d) 949; *Chicago, Rock Island & Pac. R. R. Co. v. Williams*, 245 F. (2d) 397;

Tenth Circuit: *Chicago, Rock Island & Pacific R. Co. v. Kifer*, 216 F. (2d) 753.

The allowance of the petition in this case would afford this Court the opportunity to review the problems involved herein in their entirety and resolve the existing conflicts among the Circuits.

2. The decision herein violates the 7th Amendment and is not in accord with applicable decisions of this Court: The decision in the Court below is in direct conflict with the rule established by a long and unbroken line of decisions of this Court that federal appellate courts are not empowered to review either a judgment for excessiveness of damages or the action of a trial court in granting or denying a motion for a new trial for error of fact, and this rule is applicable where the ground of the motion is that the damages awarded by the jury are excessive or inadequate.

Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474;

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359;

Southern Railway-Carolina Div. v. Bennett, 233 U. S. 80;

Herencia v. Guzman, 219 U. S. 44;

City of Lincoln v. Power, 151 U. S. 437;

N. Y., Lake Erie and Western R. Co. v. Winter, 143 U. S. 60;

Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69.

This rule against appellate review is a constitutional limitation which stems from the Seventh Amendment to the United States Constitution, *Parsons v. Bedford*, 3 Pet. 433; *New York Central and H. R. R. Co. v. Fraloff*, 100 U. S. 24. Re-examination by an appellate Court of facts on the question of damages found by a jury is a re-examination by the court in a mode not known to the common law, and, therefore, a violation of the 7th Amendment. The only modes of re-examining the facts known to the common law are the granting of a new trial by the Court where the issue is tried or to which the record is properly returnable, and an award of a *venire de novo* by an appellate court for some error of law. *The Abbotsford v. Johnson*,

98 U. S. 440, 444, 445; *City of Lincoln v. Power*, 151 U. S. 437.

Another reason given for denial of review by appellate courts is that the granting or refusing of a motion for a new trial is a matter resting solely within the discretion of the trial court. *Fairmount Glass Works v. Cub Fork Coal Co., supra.*

Since the decision of this Court in *Affolder v. New York, Chicago & St. P. L. R. Co.*, 339 U. S. 96, there has arisen a conflict among the circuits as to whether this Court has departed from the rule stated in *Fairmount Glass Works v. Cub Fork Coal Co., supra*, and the above cited cases that federal appellate courts have no power to review the excessiveness of a verdict.

In *Southern Pac. Co. v. Guthrie*, 186 F. (2d) 926, the Ninth Circuit refused specifically to overrule its former decision of *Cobb v. Lepisto, supra*, claiming that the power to review the size of the verdict is derived from *dicta* comment by this Court in *Affolder v. New York, Chicago & St. P. L. R. Co., supra*, where the Court remarked in passing that $80,000.00 for a lost leg was "not monstrous". But for a contrary meaning of the *dicta* comment of this Court in the *Affolder case*, see *St. Louis Southwestern Ry. Co. v. Ferguson* (8th Cir.), 182 F. (2d) 849 and *Stevenson v. Hearst Consol. Publication* (2nd Cir.), 214 F. (2d) 902. Obviously, there is sufficient diversity of judicial opinion to indicate that the effect of *Affolder v. New York, Chicago & St. P. L. R. Co., supra*, upon the issues herein presented is hardly free from doubt. The allowance of the petition in the case at bar would afford this Court the opportunity to resolve the prevalent doubts and conflicts among the circuits on an important question of appellate review and would be conducive to the fair and efficient administration of justice.

3. The action of the Court below constituted an invasion of the province of the jury and usurpation of the prerogative of the trial judge and is in direct conflict with Neese v. Southern Ry. Co., 350 U. S. 77: The Court below undertook the power to review and weigh the question of excessiveness of damages and reversed for the reason that in its opinion injustice has resulted from the action of the trial judge in exercising his discretion refusing to set aside the jury verdict because of the size of the award. The petitioners challenge both the power and the assumption of the Court below. They submit that not only did the Court below violate the rule that federal appellate courts have no power to review the size of the verdict in a suit of the nature herein, but also that the amount of the verdict in the instant case is amply supported by the evidence of record, and, therefore, the action of the Court below is in direct conflict with the recent holdings of this Court in *Neese v. Southern Ry. Co.*, 350 U. S. 77, and other federal appellate courts.

The basis of damages under the applicable wrongful death statute is compensation to the surviving husband and ten children for the future earnings that the deceased would have earned during her life expectancy had she lived, reduced to its present cash value, and the value of the services to each of the beneficiaries that deceased would have rendered had she not met her untimely death, reduced to its present cash value. The future earnings of deceased was clearly supported by the record evidence of deceased's age, life expectancy and earning capacity. The value of the services that deceased would have rendered to the beneficiaries, under the wrongful death statute, was clearly supported by the record evidence of deceased's habits, disposition and proclivities to render tender ministrations, unselfish devotion and countless loving services as a wife and mother to her husband and ten children surviving.

The Court below, in concluding that the evidence furnishes no sound basis for the verdict, contrary to established principles of law and invading the province of the jury, failed to view the case in the light most favorable to the petitioners; it relied solely on the past actual earnings of the deceased as conclusive that she would not have earned more during her continued life and substituted its personal judgment for the collective judgment of the jury based upon their "own observations and experiences." And in substituting its personal judgment, the Court below failed to give consideration to the decreased purchasing power of the dollar, *Atlantic Coast Line v. Wells*, 78 Ga. App. 589, 52 S. E. (2d) 496, and relied on past jury awards in several cases, although there are other cases where the awards exceeded the one in the instant case. Compare *Frasier v. Public Service Interstate Transportation Co.*, 1957 (C. A. 2), 244 F. (2d) 668, a case factually similar on the issue of damages where the Court sustained an award of $115,000.00 for the death of a parent who left surviving his widow and three children; *Lebeck v. William A. Jarvis, Inc.*, 1957 (C. A. 3), 250 F. (2d) 285, where an award of $350,000.00 was sustained; and *Lithgow v. Hamilton* (Fla.), 69 So. (2d) 776, where an award of $100,000.00 was sustained for the death of a woman survived by a husband and one son. And in *Blue's Truck Line v. Howell*, 50 Ga. App. 305, 200 S. E. 500, one of the cases cited by the Court below in comparing the jury award herein with past awards, it is interesting to note that the $35,000.00 award therein sustained by the Georgia Court for the loss of the domestic services of the deceased wife and mother in 1937, translated into present day dollar value or purchasing power, would clearly justify the value of the services of the deceased herein assessed by the jury.

Viewing the case in the light most favorable to the petitioners, as it must be viewed on appeal, it becomes clear

that the judgment is amply supported by the evidence of record. The record shows (1) that the deceased earned $1,500.00 per year at the time of her death; (2) that the deceased was 39 years of age when she was killed, at which time she had a life expectancy of 28.27 years; (3) that the deceased was survived by her husband and ten children ranging in age from 4 to 25 years; (4) that the deceased rendered valuable domestic services to each of the petitioners, consisting, *inter alia,* of nursing them while sick, cooking, preparing and serving meals, sewing, cleaning, washing, ironing, making beds, mopping and performing manual work on the family farm and (5) all of the domestic work in the home was performed by the deceased without outside aid or assistance. All these were facts and circumstances for the jury in the light of their own observations and experiences to weigh and appraise in determining the aggregate amount of damages to the petitioners by reason of the untimely death of their devoted wife and mother. From these facts, it is manifest that the damages are not too high. The jury was fully justified in concluding that from the date of death until the termination of the deceased's life expectancy the surviving husband and ten children suffered a substantial loss. Surely it is not beyond reason to place an average value of $2.00 per day for the loss to each of the petitioners of the valuable services rendered by such an unselfish and devoted wife and mother as the deceased. Of course, reasonable men might reach different conclusions—some may conclude the value to be more, and others less, and so likewise the life expectancy of deceased may be reasonably concluded to be more or less; but certainly, it was within the bounds of reasonable inference for the jury to conclude, on the basis of the evidence of record, that the value of the services of the deceased, as a wife and mother, was at least, if not in excess of, an average of $2.00 per day for each beneficiary

and that the life expectancy of deceased was at least 28.27 years, according to mortality tables, if not in excess thereof.

Thus, according to standard annuity tables, based upon the mortality table of an approximate 29 years life expectancy of Mrs. Floyd, the present worth of an annuity of $1.00 for 29 years is $12.278 invested at the high interest rate of seven per cent; and mathematically computed it appears that the present worth of the future value of the services of the deceased as a wife and mother at $2.00 per day or $720.00 per year for each beneficiary amounts to $8,840.16 or an aggregate amount for all of the eleven beneficiaries of $97,241.76, which sum at the termination of the life expectancy period of 29 years will be entirely depleted. Of course, if the computation be made on the basis of the daily rather than the annual value of the domestic services of the deceased the foregoing figure would be even higher.

It should be noted that this figure does not include the present cash value of the future earnings of the deceased during her life expectancy which respondent conceded in its motion for a new trial (R-16) amounts to $16,400.00, thus making a total of $113,641.76 as the value of deceased's life.

Consequently, when we consider the loss of the present cash value of the domestic services of the deceased and add to that the present cash value of the future earnings of the deceased during her life expectancy had she lived, it becomes manifest that $107,500.00 is not more than adequate compensation to which the beneficiaries are entitled under the Georgia wrongful death statute. It should be noted that under Georgia law each of the beneficiaries is entitled to share equally in the entire award, but if any of the beneficiaries is guilty of comparative negligence, his or her share must be proportionately diminished from

the damages recoverable. Based upon such rule it appears that the jury found the husband guilty of comparative negligence and thus, in accordance with the instructions of the Court (R. 282, 286) reduced the amount apportioned to him.

As pointed out before, damages in a case of this nature can not be determined with mathematical certainty, but from the foregoing facts and circumstances, it can be fairly, logically and reasonably concluded, although fair-minded men might reach different conclusions, that the present cash value of the future earnings and services of the deceased as a wife and mother was in consonance with the amount of damages awarded by the jury.

Under the foregoing circumstances, it is clear that the trial judge properly exercised his discretion in refusing to set aside the jury award and grant a new trial on the ground of alleged excessiveness of damages.

In its opinion the Court below stated that it recognizes "that the value of the life of a mother is not determinable solely from the evidence of the amount of money she may have earned or the actual domestic services performed" and "the actual facts of each case should guide the jury in estimating for themselves, in the light of their own observations and experiences and to the satisfaction of their own consciences, the amount which would be fair and just compensation for such loss". The foregoing quoted statements of the Court are in consonance with the applicable law, but the conclusion reached by the substitution of its personal judgment for the collective observations and experiences of the twelve jurors is clearly incongruous therewith.

And in support of the result reached by it, the Court below states in its opinion that the discretion of the trial judge is subject to review by the federal appellate court and may be reversed for what it terms "abuse of discretion."

It is manifest, however, that if the appellate court has discretion to control the discretion reposed in a trial judge this really leaves no discretion at all in the trial judge and thus nullifies the common law power of discretion vested in him. If a federal appellate court can reverse the action of a trial judge in refusing or granting a new trial in the absence of pointing out some specification of abuse, as the Court below failed to point out in the case at bar, on the part of the trial judge, such as under the circumstances noted in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 483, 484, namely: "where the amount of damages exceeds a statutory limit; or is more or less than an undisputed amount; or is in pursuance of erroneous instructions on the measure of damages; or is in clear contravention of the instructions of the court; or is the result of passion, prejudice or caprice," it would leave only personal judgment of the appellate court itself as a guide for review and the discretion which respondent claims is vested in the appellate court would smack of arbitrariness, contrary to the meaning of the term "discretion" referred to in *Langnes v. Green*, 282 U. S. 531, 541.

We submit that the discretion reposed by the common law in a trial judge must be exercised according to his own understanding and conscience. On this point, Mr. Justice Clark, speaking for this Court, in *Accardi v. Shaughnessy*, 347 U. S. 260, 266, in dealing with an analogous situation wherein discretionary power is vested in an administrative body, used the following pertinent language:

> "If the word discretion means anything in a statutory or administrative grant of power, it means the recipient must exercise his authority according to his own understanding and conscience."

So, likewise, in the instant case, if the discretionary power vested by the common law in the trial judge means anything, it means that he, as the recipient of this power,

must exercise it, not according to the understanding and conscience of the federal appellate court, but according to his own understanding and conscience. Merely because the Court of Appeals below is of the opinion that the jury should have returned a verdict for a less amount or that the trial judge should have reduced the verdict is no reason for the Court below to reverse the District Judge under the guise of "abuse of discretion." *Railroad Co. v. Fraloff*, 100 U. S. 24.

Moreover, the decisions of the various circuits, with the exception of the 5th, 4th and 9th Circuits, disclose that where the term "abuse of discretion" is mentioned in connection with factual questions arising on motions for new trial generally, it is equated with non-review.

Therefore, it is respectfully submitted that the Court below, by substituting its view of the case for that of the jury, invaded the province of the jury, contrary to the Seventh Amendment to the United States Constitution, and usurped the prerogative of the trial judge, contrary to established principles of law. Its action was also in direct conflict with the recent holding of this Court in *Neese v. Southern Ry. Co.*, 350 U. S. 77, that a federal appellate court may not reverse the action of a trial judge in refusing to grant a new trial on the ground excessiveness of damages where such action of the trial judge is not without support in the record. Compare *Snyder v. U. S.*, 350 U. S. 906.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a Writ of Certiorari, should reverse the judgment of the Court below, and should affirm and reinstate the judgment of the District Court.

Respectfully submitted,

HENRY HAMMER,
HENRY H. EDENS,
J. H. HIGHSMITH,
GORDON KNOX, JR.,
E. WAY HIGHSMITH
LAMAR W. SIZEMORE,
Attorneys for Petitioners.

APPENDIX

INDEX TO APPENDIX

PAGE

Opinion of District Judge Overruling Motion for New Trial 21

Decision of Court of Appeals for the Fifth Circuit 26

Judgment of Court of Appeals 32

Petition for Rehearing and Brief in Support Thereof .. 33

Decision of Court of Appeals for Fifth Circuit in Petition for Rehearing 41

Order Modifying Opinion and Denying Rehearing 43

OPINION OF DISTRICT JUDGE OVERRULING MOTION FOR NEW TRIAL

This is an action for the alleged tortious homicide of a wife and mother. The plaintiffs consist of the husband, Deroy Floyd, and ten children of the deceased, Mamie Floyd, the children ranging in age from 4 to 25 years. The defendant is a motor carrier engaged in the delivery of automobiles from assembly plants to various dealers, using an automobile tractor and trailer for that purpose.

The petition of plaintiff alleges: Deroy Floyd and his wife, Mamie Floyd, lived on a farm adjoining and on the southwest side of State Highway No. 15, and about 1/2 mile southeast from Hazelhurst, Georgia. On the night of July 27, 1955, these parties decided to make a telephone call. The nearest telephone was at a filling station just within the city limits of the City of Hazelhurst. The Floyds' means of transportation was a small Farmall tractor and with this they drove upon the highway, proceeding towards the telephone, the husband driving and the wife standing on the back of the tractor. They had reached a point near the city limits of Hazelhurst when a transportation unit of defendant, approaching from the rear ran into the Farmall tractor. In the collision Mamie Floyd was thrown to the pavement, receiving injuries from which her death resulted. Several acts of negligence, including violations of traffic reguiations of the State of Georgia, were charged to defendant, these being in part: Failure to control the speed of defendant's transportation unit so as to avoid running into the Farmall tractor; operating a transportation unit in excess of 50 miles per hour; failing to reduce its speed in approaching and going around a curve in the highway; failing to pass the Farmall tractor being driven in the same direction, a safe distance to the left so as to avoid hitting the tractor, and in failing to keep a proper lookout for other vehicles on the highway.

The defendant alleged that its truck was being operated at a moderate and legal rate of speed, that its driver had just come around a curve in the road and that the Farmall tractor was immediately in front of him in the middle of the right-hand lane of traffic and that said tractor was not equipped with a red tail light as required by the law of the State of Georgia, and Deroy Floyd, as well as the deceased, were charged with being negligent *per se* in this respect. It was further alleged in the answer that if there was any light burning on the rear of the Farmall tractor it was not red but was white and was hidden by the deceased, who was standing on the drawbar of the tractor.

The defendant also contended that the tractor was being driven by Deroy Floyd so slow as to impede traffic and requested the following charge, which was charged by the Court:

> "I charge you that no person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with law."

The evidence fully sustained the allegations of plaintiff's petition. It appeared that the Farmall tractor was being driven on the right-hand side of the highway leaving ample passing room on the left. While defendant's driver denied there was a light on the rear of the tractor, several eye-witnesses testified that there was a plainly visible light on the rear. Plaintiffs admitted that this light did not have a red reflector. Defendant's driver testified that in coming around the curve his lights were thrown to the right of the highway and he could not see the Farmall tractor until he was within about 30 feet of it. It was not disputed that the curve was only a 3-degree curve. The Sheriff of the county in which the accident occurred testified he made a test on this highway at night, at the same place,

under similar circumstances, and a tractor with a similar light could be seen for at least 60 feet. The State Highway Patrolman who investigated the accident testified that he was familiar with the highway at this place and approached vehicles at night, with and without lights, and they could be seen 500 to 600 feet ahead. He further stated that he could find no reason why the tractor even without light could not have been seen within ample time to avoid running into it.

The Motion filed by defendant is on the general grounds and in addition, the following grounds: (1) Amount of verdict manifests bias, prejudice and passion by the jury; (2) prejudice of jurors from Jeff Davis County, the county in which the collision occurred, and (3) improper argument of attorneys for plaintiffs.

As to the general grounds, the allegations of the petition were amply supported by the evidence as above stated.

With reference to the amount of the verdict, the laws of the State of Georgia provide in case of homicide of a wife and mother the surviving husband and children may recover for the full value of the life of the deceased.

Georgia Code Section 105-1306:

"Homicide of wife or mother—The husband may recover for the homicide of his wife, and if she leaves child or children surviving, the husband and children shall sue jointly and not separately, with the right to recover full value of the life of the decedent, as shown by the evidence, and with the right of survivorship as to said suit, if either shall die pending the action."

Georgia Code Section 105-1308:

"Full value of life of decedent, as shown by the evidence defined.—The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary

or other personal expenses of the decedent had he lived."

As applied to a wife and mother, appellate Courts of Georgia have stated: "She sustains to her husband and his household a relation special and peculiar. Her place cannot be supplied. No other is capable of filling it. The actual facts and circumstances of each shall guide the jury in estimating for themselves in the light of their own observation and experiences and to the satisfaction of their own consciences, the amount which would fairly and justly compensate for the loss".

Metropolitan Street R. R. v. Johnson, 91 Ga. 466 (3) at bottom page 471;

Standard Oil Company v. Reagan, 15 Ga. App. 572 (9).

Blue's Truck Line, Inc., v. Harwell, 57 Ga. App. 139 (7).

Under the evidence the deceased had a life expectancy of 28.27 years and rendered most valuable service to her husband and ten children. The amount of the verdict does not evidence bias and prejudice on the part of the jury, and in the opinion of the Court is reasonable.

In its motion, defendant, by the affidavit of three persons, seeks to establish prejudice on the part of the jurors from Jeff Davis County, Georgia. These facts are disputed by the affidavit of not only several citizens of the county, but by the affidavit of the jurors themselves. If prejudice towards truck drivers existed generally among the citizens of Jeff Davis County, then certainly defendant and its attorneys had ample time to discover such condition (so quickly unearthed after the verdict) prior to the trial and make a proper challenge to the array of jurors at the trial. Defendant does not contend it made any effort to discover any prejudice of the jurors prior to the trial, nor of exer-

cising its right to question jurors on this ground at the trial. No merit appears in this ground of the motion.

Defendant seems to indicate an undue number of jurors were on the panel from Jeff Davis County. An affidavit of the Clerk of Court shows the jurors to have been drawn and panels made up in the regular and proper manner. There is no evidence or knowledge of the Court to the contrary.

The final ground is based on alleged improper argument of J. H. Highsmith, attorney for plaintiffs. It appeared from the evidence that two of the plaintiffs had small children of their own. Mr. Highsmith stated in his argument that a mother continued her services to a child by helping such child with her children. On objection by attorney for defendant the Court directed that such argument be omitted. It is a matter of common experience that a mother does render service to a child by helping with the children of such child. If error was committed by the Court in directing that such argument be omitted, it might well be error in favor of the defendant. Certainly it was not grounds for a mistrial.

Defendant next contends that Mr. Highsmith as attorney for plaintiffs made the statement in his argument "We want to stop these trucks from running the farmers off the highway and a verdict of the full amount of $165,000.00 we think will do it". The burden is one (*sic*) the movant to establish the facts claimed in its motion. The Court reporter was available but defendant did not request the argument of attorneys reported. In the record it appears that Mr. Ringel, of attorneys for defendant, made an objection to argument of Mr. Highsmith, of attorneys for plaintiffs, on ground that he was arguing punitive damages. The Court asked what argument was referred to. Mr. Ringel replied that Mr. Highsmith in substance had stated: "We want you to stop these trucks from running the farm-

ers off the highway, and that a verdict for the full amount of $165,000.00 we think will do it." This was then denied by Mr. Highsmith. The Court directed the jury that such issue was not in the case and for them to disabuse their minds of it. To establish the statement attributed to Mr. Highsmith, defendant submits the affidavit of its attorneys, P. S. Ringel, T. Ross Sharpe and Alvin L. Layne, which states that such was "substantially" his argument. To the contrary Mr. Highsmith makes and submits an affidavit specifically denying the statement attributed to him and stating what he said. All the attorneys are reputable parties. It is impossible for the Court to have a recollection of statements made in arguments to the jury. After taking into consideration the affidavits submitted on the question of this statement alleged to have been made by Mr. Highsmith in his argument, the motion on this ground is denied.

It appearing that the verdict rendered in the case is reasonable and just, the motion for new trial is overruled on all grounds.

So Ordered, this 16th day of August, 1956.

F. M. SCARLETT,
Judge, U. S. District Court.

Filed in Office August 17, 1956.

DECISION OF COURT OF APPEALS FOR FIFTH CIRCUIT

November 13, 1957

Before Hutcheson, Chief Judge, and Borah and Cameron, Circuit Judges.

Cameron, Circuit Judge: Mrs. Deroy Floyd was fatally injured when the Farmall Tractor, on whose drawbar she was riding, was overtaken and struck by an empty motor vehicle carrier owned and operated by appellant, Complete Auto Transit, Inc. The accident happened on a public highway near Hazlehurst, Georgia, in the nighttime on a three

percent curve. This action was brought by the husband and ten children (ranging from 4 to 25 years in age) of the decedent under the Georgia Code, § 105-1306 and § 105-1308. The object of the trip was to enable the decedent to reach a telephone to call a hospital and ascertain the condition of her brother who was ill.

The evidence showed that the deceased was 39 years of age, with an expectancy of 28.87 years, and was working in a garment factory earning as much as $1,500.00 per year. In addition, she performed the duties of wife and mother and assisted her husband in many of his farming activities.

Appellees contended that appellant was operating this motor vehicle at an excessive rate of speed, that its driver was not keeping a proper lookout ahead and that he negligently failed to see the Farmall Tractor being operated by the husband of the decedent in time to avoid running into it. Appellant denied that the driver of its motor vehicle was negligent as charged by appellees, and alleged affirmatively that the collision was caused by failure of the tractor to be equipped with a red tail light as required under Georgia law, and by the fact that the decedent was standing on the drawbar of the tractor in such position as to obscure whatever light there was on its rear.

The jury returned a verdict against appellant in the total sum of $107,500.00, $7,500.00 in favor of the husband and $10,000.00 in favor of each child, and judgment was duly entered for that amount. Appellant moved for a new trial, contending that appellees' counsel made improper and inflammatory argument to the jury, that evidence of an experiment conducted by the sheriff of Jeff Davis County was wrongfully admitted, and that the verdict was excessive as a matter of law. The appeal from the order denying this motion is based upon the same grounds. Our decision will be based upon the ground that the court below abused its discretion in refusing to set the verdict aside as excessive, but the other two assigned errors will be discussed briefly.

During the concluding summation before the jury, Attorney J. H. Highsmith, for appellees, was making an argument which appellant's counsel thought would be proper

only if punitive damages were sought.[1] The attorneys disagree as to just what appellees' attorney did say to the jury, and the record does not present the matter with such clarity as to justify reversal because of the argument, which, if made, would come within the condemnation of the decisions of the Courts of Georgia, *e. g., Southern Stages, Inc., v. Brown*, 1948, 46 S. E. (2d) 765, and of this Court, *e. g., Atlantic Coast Line Railroad Co. v. Kammerer*, 1953, 205 F. (2d) 525, and same case, 1955, 218 F. (2d) 149.

The record before us, insofar as it goes, tends to sustain the position of appellant inasmuch as its attorney quoted the argument of appellee as he understood it, the attorney to whom the argument was attributed responded immediately and did not deny the statement as set forth by his adversary, and the court in its ruling seemed to accept appellant's version of what had been said. But, as stated, the question is not sufficiently presented by the record to justify our reversing the judgment on that ground.

Nor do we base our decision on the alleged error that the court below erred in admitting the testimony of the sheriff concerning the experiment made by him long after the accident and a few days before the trial. A tractor had been placed in the position occupied by the one which had been struck by appellant's motor vehicle, and the sheriff approached from the direction followed by it, making observation as to when the tractor would be visible; and

---

[1] During Mr. Highsmith's argument the following took place according to the record:

"Mr. Ringel: Now, if Your Honor please, we move for a mistrial because he is arguing punitive damages.

The Court: What is that?

Mr. Ringel: He is asking the jury to return a verdict for the full amount of $165,000.00 because of these large trucks running people off the highway. He stated in substance 'We want you to stop these trucks from running the farmers off the highway, and that a verdict for the full amount of $165,000.00 we think will do it.'

Mr. Highsmith: No, sir. We are not asking for any punitive damages. We are not entitled to any punitive damages. I haven't said a word about punitive damages.

The Court: Well, let's stick to the facts in the case. We are not trying trucks for running people off highways. Gentlemen of the jury, just disabuse your mind of that.

Mr. Ringel: We move again for a mistrial on that ground.

The Court: Well, I overrule you on that ground. Just argue the evidence, Mr. Highsmith."

he testified as to the distance between him and the tractor when it became visible to him. The situation existing on the night of the accident was not reproduced in all of its details, in that the tractor was standing still at the time of the experiment, the light on it was indisputably a red light, and no person wearing a dress was on the drawbar. It is manifest, moreover, that, in such an experiment, the one conducting it would be focusing his attention primarily on the tractor he knew to be at the particular point and probably to the exclusion of all other objects which normally a motorist would be called upon to include in his attention. The objection to the testimony was probably addressed more to its weight than to its admissibility, but such evidence should be received with caution and proper explanation of its weight and worth should be given to the jury.

Our reversal of the judgment of the court below is based upon the error committed by the court below in denying appellant's motion for new trial based upon the legal excessiveness of the verdict of the jury. Recent decisions of this Court have defined in clear terms the rule applying to such a situation.[2] The rule embraces these ingredients: the granting or refusing of a new trial is a matter resting within the sound discretion of the trial court exercised with regard to what is right and in the interest of justice; but that discretion is subject to review by the appellate court when it feels that injustice has resulted from the action of the lower court because of its conviction that the verdict was excessive as a matter of law and not merely as a matter of fact. In other words, the appellate court will declare that the trial court has abused its discretion if the verdict is so gross or inordinate in amount as to be contrary to right reason; and if the evidence furnishes no sound basis for the verdict, it is the inescapable duty of the appellate court to hold that the verdict was excessive as a matter of law.

We hold that such is the case here. And such a holding is in line with the Georgia statute, which forbids a court to interfere with the jury's action in fixing the dam-

---

[2] See, *e. g., Commercial Credit Corp. v. Pepper*, 1951, 187 F. (2d) 71, 75-76; *Sunray Oil Corp. v. Allbritton*, 1951, 188 F. (2d) 751; and *Whiteman v. Pitrie*, 1955, 220 F. (2d) 914, 920-921.

age "unless the damages are . . . so excessive as to justify the inference of gross mistake or undue bias."[3]

The privilege of having the wife and mother with them in the home was one which was incalculably precious to the husband and children and was an element the jury was justified in considering. But such relationships are not readily evaluated by dollar standards, and the Courts of Georgia have not emphasized them in defining what is included in the terms of the Georgia statute[4] granting the right to recover "the full value of the life of the decedent . . . ." In an old case,[5] the court said that the place of a wife cannot be filled and that the actual facts of each case should guide the jury in estimating for themselves, in the light of their own observation and experience and to the satisfaction of their own consciences, the amount which would fairly and justly compensate for such a loss.

A later case[6] stressed the earning capacity and loss of services as the important items in a suit for the death of a wife and mother. But, subsequently,[7] the court recognized that the value of domestic services rendered by a wife could include "the value of many services incapable of exact proof."

The "full financial value of the life of the deceased" was stressed in another case[8] in a decision confined almost entirely to loss of services as the chief element of recovery for the death of a wife and mother; while a broad base of recovery for the intangibles of the wife-mother relationship according to "all the facts and circumstances of the family and the living conditions", was recognized in a more recent

---

[3] Georgia Code, § 105-2015.

[4] The Georgia Statutes, Code §§ 105-1306 and 105-1308, permit "the right to recover the full value of the life of the decedent . . . without deduction for necessary or other personal expenses of the decedent had [s]he lived," but the Georgia decisions brought before us do not point definitely to the meaning of these words.

[5] *Metropolitan Street Railway Co. v. Johnson* S. Ct. Ga. 1893, 91 Ga. 466, 18 S. E. 816. The court was not dealing with the statutes here involved, but with damages recoverable by a husband for disabling personal injuries received by his wife.

[6] *Standard Oil Co. et al., v. Reagan et al.* (C. A. Ga., 1915), 84 S. E. 69.

[7] *Central of Georgia Railway Co. v. Keating* (C. A. Ga., 1932), 165 S. E. 873, 878.

[8] *Shermer v. Crowe*, 186 S. E. 224, 228.

case,[9] but a judgment awarding the husband and children a verdict was reversed because the court charged that, in determining "the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all the facts and circumstances of the case." The reason given was that the charge was not proper under the pleadings and evidence.

When the same case came on for further hearing,[10] the Court of Appeals reiterated that the value of the life of a wife and mother could not be measured by purely monetary standards, stating that the matter was entirely for the jury. The Court affirmed a verdict for $35,000.00 which, by voluntary act of the plaintiff, had been reduced to $15,000.00.

The last word from a Georgia appellate court was spoken by the Court of Appeals in *Swift & Co. v. Lawson* (C. A. Ga., 1957), 97 S. E. (2d) 168, where the Court set aside, as excessive as a matter of law, a verdict for $80,000.00 rendered to a wife for the wrongful death of her husband. At the time of his death he was thirty-eight years old and his expectancy was practically identical with that of the decedent here, and his earnings were shown to be more than double those claimed in the case before us. The Court discussed a number of Georgia cases and concluded that the jury had a wide latitude in the fixing of damages so long as the result they reached was "fair and reasonable and as authorized by the evidence."

Appellees have not cited us to any case justifying the award of any such amount as that here, but they content themselves with repeating in many different ways the rule we here recognize, that the value of the life of a mother is not determinable solely from the evidence of the amount of money she may have earned or the actual domestic service performed, and that the case is definitely an exception where an appellate court will reverse the action of a trial

---

[9] The case is reported three times: *Blue's Truck Line, Inc., v. Harwell* (C. A. Ga., 1937), 194 S. E. 399, 402; reversed by Sup. Ct. of Ga., 1938, 199 S. E. 739; and see fn. 10 *infra*.

[10] *Blue's Truck Line, Inc., v. Harwell et al.* (C. A. Ga., 1938), 200 S. E. 500, 502.

court in passing on a motion for a new trial challenging the size of the verdict.

Appellants have listed eight Georgia cases, which they assert to be all they have been able to find where verdicts have been permitted to stand in cases involving death of a wife and mother. These amounts run from $5,000.00 to $15,000.00, and appellants take the position that the sole question involved is the value of the decedent's life, the number of children surviving, the character of support to which they have been accustomed and like considerations being of no moment. *Cf. Central of Georgia Railroad Co. v. Rouse* (S. Ct. Ga.), 3 S. E. 307; *Macon Consolidated Street Railroad Co. v Barnes* (C. A. Ga.), 38 S. E. 756; *Engle v. Finch* (S. Ct. Ga.), 139 S. E. 868; and *Central Truckaway System, Inc., v. Harrigan* (C. A. Ga.), 53 S. E. (2d) 186.

It is not necessary for us, however, to assess or evaluate the various ingredients which the Georgia Courts recognize as entering into the concept of the value of decedent's life. Taking all of these ingredients into consideration, we hold that there is no justification for a judgment based upon a verdict in the amount fixed by the jury in this case, and that the verdict is excessive as a matter of law and is not sustained by any evidence or authority.

The judgment of the court below is reversed and the case remanded for a new trial.

(Reversed and remanded.)

JUDGMENT

Extract from the Minutes of November 13, 1957

No. 16424

COMPLETE AUTO TRANSIT, INC.

versus

DEROY FLOYD *ET AL.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial;

It is further ordered and adjudged that the appellee, Deroy Floyd, and others, be condemned to pay the costs of this cause is this Court for which execution may be issued out of the said District Court.

PETITION FOR REHEARING

Come now Deroy Floyd *et al.*, appellees in the above entitled cause, in which, during the present term and on November 13, 1957, a decision was rendered reversing the judgment of the lower court, and petition the court to grant a rehearing therein, upon the following grounds:

1. This Court holds the verdict rendered by the jury and approved by the trial court excessive as a matter of law, basing this conclusion on the ground that "it is not sustained by any evidence or authority." The decision does not indicate what evidence and authority would be required. If the laws and decisions of this State are applicable the verdict is supported by authority and evidence.

The Code of Georgia provides that appellees, comprising the surviving husband and ten children of the deceased wife and mother are entitled to recover the full value of her life.[1] Under the decisions of the Court of Appeals and Supreme Court of Georgia there is no standard set to determine the value of the services rendered by the wife and mother, but it is a question left to the jury to decide, after proof of services, based on their observation and experience to the satisfaction of their own consciences.[2]

The record discloses evidence of the following personal services rendered by the deceased to appellees (Testimony

---

1 Georgia Code, §§ 105-1306, 105-1308.

2 *Metropolitan Street R. R. Co. v. Johnson*, 91 Ga. 466 (18 S. E. 816); *Standard Oil Co. v. Ragan*, 15 Ga. App. 571 (84 S. E. 69); *Pollard v. Kent*, 59 Ga. App. 118 (200 S. E. 542); *Blue's Truck Line, Inc., v. Harwell*, 57 Ga. App. 136 (194 S. E. 399); *Ga. Ry. Power Co. v. Shaw*, 25 Ga. App. 146 (3) (102 S. E. 904); *Western & Atlantic R. R. Co. v. Jarrett*, 22 Ga. App. 313 (2) (96 S. E. 17).

of Deroy Floyd, the husband, R. pp. 162-165): There were twelve children born of my marriage to Mamie Floyd. Ten are living. They range in age from four years to twenty-five years. My wife worked in the slip factory in Hazelhurst, having started working there in June, 1949. She did the housework and helped me on the farm. The housework consisted of making beds, cooking, washing, ironing, patching, mopping and yard sweeping. She took care of the children. When they were sick at night she got up with them. She nursed them while they were sick. She got them ready for school. She did all the things that the mother of children do. In addition, she helped me with the farm work. She was always right there to help me do anything that I had to do. She would hoe or plow or do anything that became necessary to help me. She took the job at the slip factory because there was so many of us it looked like we couldn't make it on the farm on shares and she got out to help me meet the grocery bill. She went to work at the slip factory at 8:00 o'clock in the morning. Before going to work she got breakfast for the family and the youngest children ready for school. She worked at the slip factory until 4:30. When she came home frequently she put out her washing in the afternoon. There was always something she could find to do, such as making shirts and little dresses. She got the supper for the family and then she got the younger children ready for bed. She worked and helped with the farm work, too, like putting in tobacco or anything that we were not through with when she got in she would help me. It was admitted that the deceased had a life expectancy of 28.87 years.

The laws of this State authorizing recovery by appellees for the full value of the life of the deceased, this value being a jury question after evidence of death, status of appellees as husband and children and services rendered by deceased, all of which the evidence did show, the conclusion reached by this Court that the verdict is not sustained by any **evidence or authority**[3] is not supportable.

2. There being ample evidence of services rendered by the deceased to appellees, her husband and children, and

[3] All emphasis in this petition supplied.

a loss to appellees of such services for a period of 28.87 (the life expectancy of deceased) and the question of value being a jury question, it cannot be legally said that the verdict is without support in the record.

The verdict having support in the record, the decision of this Court is directly contrary to the holding of the Supreme Court of the United States in the case of *Neese v. Southern Railway Company*, 350 U. S. 77, which holds the test for determining whether or not the court below abused its discretion in approving the amount of the verdict is whether the trial court's action was without support in the record.

It also conflicts with this Court's opinions rendered in the cases of *Texas & Pacific Railway Company v. Buckles*, 232 F. (2d) 257 (17); *Kansas City Southern Railway Company v. Justis*, 232 F. (2d) 267 (7).

3. The record showing appellees entitled to recover the full value of the life of the deceased as determined by the value of proven services rendered by deceased to appellees, the question of the value of such proven services being one for the jury, and there being no evidence from which bias or prejudice on the part of the jury could be shown or inferred, the decision of this Court reversing the judgment of the trial court based on the verdict of the jury, is a denial of appellees' constitutional right to have the matter determined by a jury, such right being provided for in the Seventh Amendment to the Constitution of the United States as follows:

> "Trial by Jury in Civil Cases—In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

To have this Court determine the amount the jury may return for the value of the life of the deceased wife and mother of appellees by limiting such amount, when the verdict returned is supported by the record, is a deprivation

of appellees' constitutional rights as above set forth, to the prejudice and injury of appellees.

4. This Court in its opinion, referring to the case of *Blue's Truck Line, Inc., v. Harwell*, 57 Ga. App., p. 136 (194 S. E. 399, 402), a case decided in 1937 holding a verdict for $35,000.00 for the death of a wife and mother was not excessive, stated:

> "• • • a judgment awarding the husband and children a verdict was reversed because the court charged that, in determining 'the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all the facts and circumstances of the case.' The reason given was that the charge was **not** proper under the pleadings and the evidence."

This is an erroneous statement with respect to the holding of the Georgia Court of Appeals, that court holding exactly to the contrary at page 140 of the decision in the following language:

> "The charge of the court to the jury that 'in determining the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all the facts and circumstances of the case' was **not** subject to the objection that it was not authorized by the pleading and there was no evidence of any service performed by the deceased as a wife and mother."

As shown, the Georgia Court of Appeals approved the charge of the trial court in this connection rather than reversing the case on account of such charge.

5. The decision of this Court recognizes that appellees are entitled to recover full value of the life of the deceased wife and mother, that such a life includes many services incapable of exact proof, that the value of such services is a jury question, then without stated reason, reaches the unsupported conclusion that the verdict is not sustained by any evidence. It leaves appellees and the trial court, to whom this case is remanded for another trial, totally in the dark as to what evidence this Court would accept as

supporting a verdict for the death of a wife and mother. If by its decision this Court meant to hold that the evidence would support a verdict in some amount, but not the amount rendered, then, still, appellees, the jury, and the trial court judge must guess, without guidance from this Court, at the size of verdict this Court would allow to stand.

May we suggest that under such conditions it is very possible that the case would have to be retried many times, with burdensome expense to all parties, as well as much time consumed by the trial court, in order to arrive at a verdict that would fit this Court's conception of a proper verdict to be rendered for the value of the life of a deceased wife and mother.

WHEREFORE, on the grounds stated petitioners pray that the decision of this Court rendered on November 13th, 1957, be reviewed and the judgment of the trial court affirmed, or, in the alternate, that a rehearing be granted in said matter.

J. H. HIGHSMITH,
GORDON KNOX, JR.,
E. WAY HIGHSMITH,
Attorneys for Appellees.

Certificate of Counsel

I, the undersigned, J. H. Highsmith, of counsel for appellees, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

J. H. HIGHSMITH.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

"THE INJUSTICE OF JUSTICE"

The decision of this Court holds that as a matter of law the life of a wife and mother for a period of 28.87 years does not have the value of $107,500.00. Appellants no doubt applaud this as justice. Since appellees know of decisions of the circuit courts sustaining larger verdicts, not only for loss of life, but for loss of limbs and for personal

injuries not causing death; is it cause to wonder that they may exclaim "The injustice of justice!"

Some of the larger verdicts are as follows:

$297,500.00—Extensive and serious injuries (details not given in reported decision)
Woodington v. Pa. RR. Co., 236 F. (2d) 760 (C. C. A. 2).

$225,000.00—Loss of arms and legs
Union Pac. RR. Co. v. Johnson, 223 F. (2d) 427 (C. C. A. 9).

$150,000.00—Injuries to shoulder and leg—disability
Houlihan v. Turner Constr. Co., 240 F. (2d) 435 (C. C. A. 1).

$126,780.00—Loss of both arms
Blue Ridge Rural Elec. Coop. v. Byrd, 238 F. (2d) 346 (C. C. A. 4).

$125,000.00—Loss of leg
Cereste v. N. Y., N. H. & H. RR., 231 F. (2d) 50 (C. C. A. 2).

$125,000.00 Crippled for life
U. S. v. Luehr, 208 F. (2d) 138 (C. C. A. 9).

$141,500.00—Death $116,500.00—pain and suffering $25,000.00
N. Y., N. H. & H. RR. Co. v. Zermani, 200 F. (2d) 240 (C. C. A. 1).

$114,295.00—Injury to back
E. L. Farmer Co. v. Hook, 239 F. (2d) 547 (C. C. A. 10).

As above noted verdicts substantially larger than the verdict in the instant case have been held not excessive, such verdicts being for loss of limbs, personal injuries of various kinds, and death. How may it be explained, particularly to laymen, that a verdict of $297,500.00 for disabling personal injuries is not excessive but $107,500.00 for the value of the life of a wife and mother to a husband and ten children is excessive; that arms and legs are worth $225,000.00 but a wife and mother is not worth half that sum; that the disability to a man may be legally valued at $150,000.00 but the value of a woman to her family is legally less than $107,500.00; that a wife may recover $141,500.00 for the loss of her husband, but that a husband and ten

children may not recover $107,500.00 for the loss of the wife and mother; and finally, that partial loss of use by injury of a man's back may be valued at $114,275.00, but a $107,500.00 value for the total and permanent loss of his wife to a man and his children is legally excessive? All of this may be understandable to astute legal minds, but may not the legally unlearned husband and children with cause cry of "the injustice of justice?" Even legally trained minds may pause to wonder.

EXCESSIVENESS

The court in its decision on the question of excessiveness refers to the cases of *Commercial Credit Corp. v. Pepper*, 1951, 187 F. (2d) 71, 75-76; *Sunray Oil Corp v. Allbritton*, 1951, 188 F. (2d) 751; and *Whiteman v. Pitrie*, 1955, 220 F. (2d) 914, 920-921.

These decisions were prior to the decision of *Neese v. Southern Ry.*, 350 U. S. 77, 76 S. Ct. 131.

Be that as it may, the decisions of this Court in the cases above referred to hold in substance that the verdict may be excessive as a matter of law (1) if without support in the record, (2) if so monstrous or inordinate in amount as to find no support in right reason.

Seemingly, the decision of excessiveness in the instant case is based on the first proposition, "without support in the record," since it concludes "the verdict is excessive as a matter of law and is not sustained by any evidence or authority." This conclusion is in the face of a prior statement in the decision, "we here recognize that the value of the life of a mother is not determinable solely from the evidence of the amount of money she may have earned or the actual domestic services performed." It is assumed that the Court recognizes, that evidence of extensive services rendered by the deceased wife and mother were shown, and the Georgia rule that the value of such services are to be determined by the jury in the light of their own observation and experience and to the satisfaction of their own consciences. If these two indisputable facts are admitted then the conclusion that the verdict is not sustained "by any evidence or authority" is of itself without support.

If we follow the decisions cited by this Court, rendered prior to *Neese v. Southern Railway, supra*, the other basis on which the decision of excessiveness may be placed is that it is "so monstrous or inordinate in amount as to find no support in right reason."

The writer would certainly not assume, or think, that the decision or excessiveness was placed on such a base, since, so placed, it would necessarily be an indictment of the twelve men of the jury who found such a verdict, and the trial judge who approved it, as acting without right reason. Such an indictment would be without truth. In this day of the devaluated dollar and high prices, continually spiraling higher, a statement to the effect that a value of $107,500.00 placed on 28.87 years of the life of a wife and mother is without support of right reason, seems a statement that might well be described as monstrous and inordinate.

Recently, and particularly since *Neese v. Southern Railway*, this Court has followed the rule that on the ground of excessiveness it would not reverse a judgment based on a verdict of a jury unless "without support in the record." This would seem the proper rule. The determination of "support" in the record is one of fact. The question of an amount of the verdict being monstrous or inordinate is one of opinion on which minds will differ. As the writer interprets the holdings of the Supreme Court it is within the province of the trial court to decide (1) whether verdicts are supported by the record and (2) whether reasonable; the province of the circuit courts to determine whether such verdicts are supported by the record.

If this is not the rule, the Circuit Courts of Appeal may always reverse verdicts of impartial injuries, approved by the trial court, where no other error appears in the record, by deciding the amount of the verdict is monstrous or inordinate.

Thus may be circumvented the holdings of the Supreme Court and rights of parties to trial by jury as provided by the Seventh Amendment to the Constitution.

We submit that this case should be reconsidered and the judgment affirmed.

J. H. HIGHSMITH,
GORDON KNOX, JR.,
E. WAY HIGHSMITH,
Attorneys for Appellees.

DECISION OF COURT OF APPEALS FOR FIFTH CIRCUIT ON PETITION FOR REHEARING

(January 14, 1958)

Before Hutcheson, Chief Judge, and Borah and Cameron, Circuit Judges.

Per Curiam: In their petition for rehearing, appellees challenge the accuracy of our construction of the decisions of the Georgia Courts in *Blue's Truck Line, Inc. v. Harwell et al,*[8] as reflected in the language of two paragraphs of our opinion filed November 13, 1957.[9] A reading of the opinion in the *Harwell case, supra,* as reported in 57 Ga. App. 136, 140, convinces us that appellants are correct, and the two paragraphs quoted in Note 9 *supra* are excised from the opinion, together with Notes 8, 9 and 10 accompanying those paragraphs. In lieu thereof the following paragraph and notes are substituted:

---

[8] The case is reported three times: *Blue's Truck Line, Inc., v. Harwell,* C. A. Ga., 1937, 57 Ga. App. 136, 194 S. E. 399; reversed by Supreme Court of Georgia, 1938, 199 S. E. 739; following which the Court of Appeals of Georgia affirmed the judgment of the lower court which it had reversed in the report of the case first listed—200 S. E. 500.

[9] "The 'full financial value of the life of the deceased' was stressed in another case in a decision confined almost entirely to loss of services as the chief element of recovery for the death of a wife and mother; while a broad base of recovery for the intangibles of the wife-mother relationship according to 'all the facts and circumstances of the family and the living conditions', was recognized in a more recent case; but *a judgment awarding the husband and children a verdict was reversed because the court charged that, in determining 'the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all of the facts and circumstances of the case.' The reason given was that the charge was not proper under the pleadings and evidence.*'

"When the same case came on for further hearing, the Court of Appeals reiterated that the value of the life of a wife and mother could not be measured by purely monetary standards, stating that the matter was entirely for the jury. The Court affirmed a verdict for $35,000.00 which, by voluntary act of the plaintiff, had been reduced to $15,000.00."

"The 'full financial vale of the life of the deceased' was stressed in another case [10] in an opinion discussing damages arising from loss of services as the chief element of recovery for the death of a wife and mother. But a broad base of recovery for the intangibles of the wife-mother relationship according to 'all the facts and circumstances of the family and the living conditions' was recognized in the decisions of *Blue's v. Harwell, supra.* In that case the jury had awarded damages for the death of a wife in the sum of $35,000.00 and the Court of Appeals refused to set it aside as being the product of gross mistake or undue prejudice or bias on the part of the jury." [11]

The excised paragraphs from the original opinion were based upon the report of the *Harwell case* (57 Ga. App. 136, 140) in 194 S. E. 399, 402,[12] and the opinion as originally written faithfully reflected this holding. But the same paragraph, as published in the Georgia Reports, contains language reflecting a meaning which is the opposite of that set forth in the Southeastern Reporter.

With this modification of the opinion, it is ordered that the petition for rehearing be, and it is DENIED.

---

[10] (The portions specifically excepted to are in italics.) *Shermer v. Crowe*, 186 S. E. 224, 228.

[11] *Blue's Truck Line, Inc., v. Harwell et al.* (C. A. Ga., 1938), 200 S. E. 500, 502.

[12] The opinion as there reported reads:

"A charge of the court, that 'in determining the value of the services of the deceased as a wife and mother, as well as a worker, the jury may consider all of the facts and circumstances of the case' is not authorized by the pleadings, and there was no evidence of any services performed by the deceased as a wife and mother."

And the eighth syllabus of the case as reported in 194 S. E. 400 reads as follows:

"In action for death of wife and mother, instruction that, in determining value of services of deceased as a wife and mother, as well as a worker, jury might consider all facts and circumstances of the case, was not authorized by pleadings and evidence."

ORDER MODIFYING OPINION AND DENYING REHEARING

Extract from the Minutes of January 14, 1958

No. 16424

COMPLETE AUTO TRANSIT, INC,

versus

DEROY FLOYD, ET AL.

It is ordered by the Court that the opinion of this Court rendered on November 13, 1957 in this cause be, and the same is hereby, modified in accordance with the opinion this day rendered; and that the petition for rehearing be, and it is hereby denied.

LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U.S.
FILED
MAR 31 1958
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1957

No. 825

DEROY FLOYD, FRANCES FLOYD DYAL, IRENE FLOYD WILLIAMS, and W. D. FLOYD, ROBBY RAY FLOYD, BOBBY GENE FLOYD, DAVID EARL FLOYD, JAMES PRICE FLOYD, HAZEL FLOYD, J. E. FLOYD and JO ANN FLOYD, minors, by and through their next of friend, their father, DEROY FLOYD, Petitioners,

versus

COMPLETE AUTO TRANSIT, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

CUBBEDGE SNOW
Macon, Georgia

T. ROSS SHARPE
Hazlehurst, Georgia

PHILIP S. RINGEL
Brunswick, Georgia

ALVIN L. LAYNE
Lyons, Georgia

T. BALDWIN MARTIN
Macon, Georgia
Attorneys for Respondent

T. Baldwin Martin

INDEX

Questions . . . . . p. 1

Statement of Facts . . . . . p. 2

Summary of Argument . . . . . p. 5

The Georgia Law . . . . . p. 6

No Conflict Among Circuits . . . . . p. 11

Seventh Amendment Not Contravened . . . p. 13

Other Errors Required New Trial . . . . p. 16

Conclusion . . . . . p. 18

CITATIONS

Affolder v. New York . . . Co., 339 U. S. 96 . . . p. 15
Ballard, et al. v. Forbes, 208 F. 2d 883 (888) (1CCA) . . . . . p. 11
Barry v. Edmund, 116 U. S. 550 . . . . . p. 15
Blue's Truck Lines, Inc. v. Harwell, 59 Ga. App. 305, 200 S. E. 500 . . . . . p. 10
Brest v. Philadelphia Transportation Co., 216 F. 2d 331 (332) (3CCA) . . . . . p. 12
Brown v. Georgia-Tennessee Coaches, 88 Ga. App. 519 77 S.E. 2d 24 . . . . . p. 7
Bucher v. Krause, 200 F. 2d 576 (588) (7CCA) . p. 12
Bunch v. McLeskey, 173 Ga. 545 (3), 161 S. E. 128 . . . . . p. 8
Central Georgia Railway Co. v. Keating, 45 Ga. App. 811, 165 S. E. 873 . . . . . p. 8
Central Truckway System, Inc. v. Harrigan, 79 Ga. App. 118 (4), 53 S. E. 2d 186 . . . p. 8
Chicago Great Western Railroad Co. v. Casura, 234 F. 2d 441 (448-9) (8CCA) . . . . . p. 13
Chicago, Rock Island & Pacific Railroad Co. v. Kifer, 216 F. 2d 753 (756-7) (10CCA) . . . . . p. 13
Cobb v. Lepisto, 6 F. 2d 128 (129) (9CCA) . . p. 13
Cominskey v. Pennsylvania Railroad Co., 228 F. 2d 687 (688) (2CCA) . . . . p. 12
DeLoach Mill Manufacturing Co. v. Tutweiler Coal . . . Co., 2 Ga. App. 493 (3) 58 S. E. 790 p. 16
Engle v. Finch, 165 Ga. 131, 139 S. E. 868 . . . p. 6
Erie Railroad v. Tompkins, 304 U. S. 64 . . . . p. 10
Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 . . . . . p. 15
Freightways, Inc. v. Stafford, 217 F. 2d 831 (8) (8CCA) . . . . . p. 16

CITATIONS—Continued

Galloway v. U. S., 319 U. S. 372 . . . . . p. 15

General Oil Co. v. Crowe, 54 Ga. App. 139 (187 S. E. 221) . . . . . p. 9

Georgia Railroad & Banking Co. v. Farmer, 45 Ga. App. 130, 164 S. E. 71 . . . . . p. 9

Georgia Railway & Power Co. v. Shaw, 25 Ga. App. 146, 102 S. E. 904 . . . . . p. 9

Glawson v. Southern Bell . . . Co., 9 Ga. App. 450 (4) 71 S. E. 747 (4) . . . p. 7

Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S. E. 2d 720 . . . . . p. 17

Hulett v. Brinson, 229 F. 2d 22 (25) (CADC) . p. 13

Jones v. Securities & Exchange Commission, 298 U. S. (p. 1, 24) . . . . . p. 15

Langes v. Green, 282 U. S. 531. 75 L. ed. 520 . . p. 14

Lewis v. Williams, 78 Ga. App. 494, 51 S. E. 2d 532 p. 10

Marron v. Atlantic Refining Co., 176 F. 2d 313 (p. 315) (3CCA) . . . . . p. 17

Neese v. Southern Railway Co., 350 U. S. 77 . . p. 11

New York Central Railroad v. Johnson, 279 U. S. 310 (6&7) . . . . . p. 16

Ocilla Southern Railroad Co. v. Taylor, 27 Ga. App. 733, 110 S. E. 244 . . . . . p. 9

Parsons v. Berford, 3 Pet. 433 . . . . . p. 15

Pickron v. Garrett 73 Ga. App. 61 (3) 35 S. E. 2d 540 . . . . . p. 17

Pollard v. Kent, 59 Ga. App. 118, 200 S. E. 542 . p. 9

Snyder v. U. S., 350 U. S. 906 . . . . . p. 11

Southern Railway Co. v. Harbin, 135 Ga. 122, 68 S. E. 1103 . . . . . p. 17

CITATIONS—Continued

Southern Stages, Inc. v. Brown, 76 Ga. App. 694, 46 S. E. 2d 765 . . . . . p. 16
Spero Nelson v. Brown, et al., 175 F. 2d 86 (89) (6CCA) . . . . . p. 12
Stanbury v. United States, 219 F. 2d 165 (169) . p. 17
Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 . . . . . p. 9
Sunray Oil Corporation v Allbritton, 187 F. 2d 475 (477-84) . . . . . p. 14
Swift & Co. v. Lawson, et al., 95 Ga. App. 35 (8) 97 S. E. 2d 168 . . . . p. 10
The Central Railroad v. Rouse, 73 Ga. 393 (1&6) 3 S. E. 307 . . . . . p. 6
Virginian Railway Co. v. Armentrout, 166 F. 2d 400 (407) (4CCA) . . . . . p. 12
W. & A. Railroad v. Townsend, 36 Ga. App. 70 (7) 135 S. E. 439 . . . . p. 8,
Western & Atlantic Railroad Co. v. Jarrett, 22 Ga. App. 313 (96 S. E. 17) . . . . . p. 9
Wilson v. Loewus, 56 Ga. App. 738 (4) 193 S. E. 793 . . . . . p. 17
Yick Wo v. Hopkins, 118 U. S. 356 (369-70) . . p. 14

OTHER REFERENCES

Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 4, Part 1, P. 329, Sec. 2292 . . p. 17
Title 28, Sec. 753 (b) U.S.C.C.A. . . . . p. 17
Ga. Code Ann. Sec. 3-505, 1955 Cum. Pocket Part Supp. and Sec. 105-1310, 1955 Cum. Pocket Part Supp. . . . . p. 7
Ga. Laws 1952 (p. 224 & 245-6) . . . . . p. 7

Supreme Court of the United States

October Term, 1957

No. 825

DEROY FLOYD, FRANCES FLOYD DYAL, IRENE FLOYD WILLIAMS, and W. D. FLOYD, ROBBY RAY FLOYD, BOBBY GENE FLOYD, DAVID EARL FLOYD, JAMES PRICE FLOYD, HAZEL FLOYD, J. E. FLOYD and JO ANN FLOYD, minors, by and through their next of friend, their father, DEROY FLOYD, Petitioners,

versus

COMPLETE AUTO TRANSIT, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS

I.

In a diversity case does a decision of the Circuit Court of Appeals that the District Court abused its discretion in denying a motion for a new trial on the ground that the verdict of the jury was grossly, inordinately excessive contravene the Seventh Amendment to the Constitution of the United States?

II.

Granting that the Circuit Court of Appeals has the duty to decide whether a District Court has abused its discretion in refusing to grant a new trial on the ground that

the verdict was grossly excessive, should the Supreme Court of the United States be burdened with a review of the record in a diversity case to determine whether the Circuit Court of Appeals erred in reversing the District Court for its alleged abuse of discretion?

III.

There were four additional specifications of error which respondent earnestly contends required the grant of a new trial: (1) grossly improper argument by petitioners' counsel, (2) admission in evidence of an experiment not based on the proven facts, (3) the invalidity of the verdict by reason of repugnancy and (4) the failure of the trial judge to have the argument of counsel reported.

STATEMENT OF FACTS

Respondent believes the following additional facts are necessary for a clear understanding of the issues:

On the night of July 27, 1955, the decedent was standing on the drawbar of a small Farmall Tractor operated by her husband on a Georgia highway. Respondent's truck and trailer unit (alleged in the suit to be of the maximum width and within one foot of the maximum length of vehicles allowable under the law of Georgia), traveling in the same direction as the Farmall Tractor, struck it causing Mrs. Floyd to be thrown to the pavement receiving injuries from which she died six days later.

It was alleged that the respondent's driver was negligent in exceeding the speed limit, in not watching the road and in not seeing the tractor. Respondent denied that its driver was negligent and affirmatively plead that the collision was caused by the failure of the Farmall Tractor to be equipped with a red taillight as required by Georgia

law and further that even if a white light was burning, it was obscured by the decedent standing on the drawbar of the tractor.

The evidence was in dispute as to the speed of respondent's truck and trailer, as to the location of the tractor with respect to the pavement and the distance it could have been seen by respondent's driver.

It was not disputed that the tractor did not have a red taillight. Whether the white light was burning, and, if burning whether the decedent obscured it were in issue.

The trial judge, over objection of respondent, permitted the sheriff of the local county to testify that in an experiment conducted a few days before the trial he could see a tractor with a *"reddish"* taillight of the same kind as the one on which the decedent was riding located in the same place, *but without anyone standing on the drawbar,* for a distance of six-hundred feet before he reached it. (R. 62-4)

In the concluding argument, counsel for petitioners urged the jury to bring in a verdict for the full amount sued for, $165,000.00 "to stop these large trucks from running people off the highway." (R. 264-5)

The trial judge overruled the respondent's motion for a mistrial merely instructing the jury that they weren't trying trucks for running people off the highway and to disabuse their minds of that.

The trial judge did not direct the court reporter to report the argument although the parties had not specifically agreed to the contrary, but the court reporter did record respondent's motion for mistrial, petitioners' counsel's reply and the district judge's ruling.

The jury's verdict was for $107,500.00—$7,500.00 to the husband and $10,000.00 to each child.

Respondent in support of its appeal specified as error the District Court's abuse of its discretion in denying the motion for new trial on the ground of the excessiveness of the verdict, the improper argument, the admission of the sheriff's evidence as to the experiment, the court's failure to have the argument reported and the invalidity of the verdict on account of repugnancy in that the jury by awarding the husband a lesser amount than the children necessarily found that the husband was negligent and that since the wife was guilty of the same negligence as the husband, a verdict for the children for a greater amount than the husband was void, since the mother's negligence was imputable to her children.

The Circuit Court of Appeals held with respect to the alleged improper argument that the record tended to sustain the position of respondent, but that it was not sufficiently clear to justify a reversal on that ground.

The Circuit Court also indicated that the evidence of the sheriff as to the experiment should not have been admitted—certainly not without precautionary instructions.

The alleged errors as to the repugnancy of the verdict and the failure of the trial judge to order the argument reported were not passed upon.

With respect to the alleged abuse of discretion of the trial judge in refusing to grant a new trial on the ground that the verdict was excessive, the Circuit Court of Appeals clearly said:

> "The granting or refusing of a new trial is a matter resting within the sound discretion of the trial court exercised with regard to what is right and within the interest of justice; but that discretion is subject to review by the Appellate Court when it feels that injus-

tice has resulted from the action of the lower court because of its conviction that the verdict was excessive as a matter of law and not merely as a matter of fact."

ARGUMENT

I.

Summary

This is no case for the grant of certiorari.

It involves solely Georgia's unique law with respect to the measure of damages in homicide cases. It would be calamitous if this court should have to assume the burden in diversity cases of reviewing the record to determine whether under the various state laws prescribing the measure of damages the Circuit Courts of Appeals had erred in holding that the District Court has abused its discretion in denying a new trial on the ground that the verdict was excessive.

The decision of the Fifth Circuit is not in conflict with decisions of the other circuits. Indeed, every Circuit Court has held either directly or impliedly that Appellate Courts have a right and duty to determine whether the District Court has abused its discretion in the refusal of a new trial on the ground that the verdict was inordinately excessive.

This decision does not in anywise contravene the Seventh Amendment.

It was clearly correct not only because the verdict was monstrous and gross, but by reason of the other grievous errors which had permeated the verdict.

II.

The Georgia Law

The verdict (the validity of which will be discussed later)—one amount for the husband and another for the children—might cause one unfamiliar with Georgia law to conclude that the measure of damages in a homicide case under Georgia law is determined by the *value of the contributions of the decedent to the survivors.*

In no sense is this true.

As said by the Supreme Court of Georgia in the case of *Engle v. Finch*, 165 Ga. 131; 139 S. E. 868:

> "It (the statute) is penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause of action is vested." (p. 134 Ga.) (p. 869 S. E.)

In an early case it was said by the Supreme Court of Georgia:

> "In a suit by a wife for the homicide of her husband, the number of minor children is not in issue, nor is their means of support . . .
>
> "The measure of damages . . . for the homicide of her husband . . . depends solely on the value of the husband's life."
>
> THE CENTRAL RAILROAD v. ROUSE,
>
> 73 Ga. 393 (1 & 6) 3 S. E. 307

The Georgia Law (Sec. 105-1308) prescribes the same yardstick for the homicide of a wife as it does for a husband.

In an action by the husband under the statute for the homicide of his wife, the measure of damages is the full

value of the life of his wife without additional damages for mental anguish. *Glawson v. Southern Bell . . . Co.*, 9 Ga. App. 450 (4); 71 S. E. 747 (4).

However, the statutory cause of action does not destroy the husband's common law right of action for loss of consortium. *Brown v. Georgia-Tennessee Coaches*, 88 Ga. App. 519; 77 S. E. 2d 24.

Likewise, the right of action of the husband and children to recover the full value of the life of the mother does not impair the administrator's cause of action for the decedent's medical and funeral expenses and her pain and suffering sustained between the date of injury and death. (Ga. Code Ann. Sec. 3-505, 1955 Cum. Pocket Part Supp. and Sec. 105-1310 1955 Cum. Pocket Part Supp.) See also Ga. Laws 1952 (p. 224 & 245-6)

It is true that the Appellate Courts of Georgia have held that a recovery is not denied because the wife and mother did not earn money and there is no direct evidence of the value of the wife's services by the day, week or month.

The jury may apply its own experience and observation in evaluating the decedent's services as a wife and mother.

Of course, a mother renders services around the home for which she receives no monetary compensation. So does the father. The fact that the Supreme Court of Georgia held that there could be a recovery for the homicide of the wife without actual proof of the value of her services did not establish some metaphysical, imaginary standard of recovery to permit a larger verdict for the homicide of a wife than for a husband.

The court knows judicially that if the jury had applied their common experience and observation in determining the value of the deceased around the home, they could

not at the outside have placed a higher valuation than $200.00 per month for such services.

The verdict of $107,500.00 placed the present value of the decedent's life at $110,000.00. It is a matter of simple arithmetic that in order to find the present value of $110,000.00, the jury would have had to establish the average value of the decedent's services for every year of her expectancy at more than $10,000.00 per annum!

As said by the Court of Appeals of Georgia in the case of *Central Georgia Railway Co. v. Keating*, 45 Ga. App. 811; 165 S. E. 873:

> "The full value of the life of the wife . . . is its present value, and that is arrived at by determining from the evidence the gross value of the life of the wife, and then reducing this amount to its present cash value." (p. 819 Ga.) (p. 878 S. E.)

In the case of *Central Truckway System, Inc. v. Harrigan*, 79 Ga. App. 118 (4); 53 S. E. 2d 186, the Court of Appeals of Georgia emphatically rejected the contention that the future lost services of the wife are to be determined according to the enlightened consciences of impartial jurors. (p. 126 Ga. App.) (p. 192 S. E. 2d)

The Georgia law provides that the gross value of the life of the decedent must be reduced to its present cash value on the basis of seven per cent interest, (*Bunch v. McLeskey*, 178 Ga. 545 (3); 161 S. E. 128), as contrasted with the current earning rate of money applicable to actions under the Federal Employers' Liability Act. (*W. & A. Railroad v. Townsend*, 36 Ga. App. 70 (7); 135 S. E. 439)

No reported case in Georgia has remotely approached the size of this verdict for the death of a wife and mother.

We set out below every reported Georgia decision and the amount of the verdict for the homicide of a wife and mother.

1) STANDARD OIL CO. v. REAGAN
15 Ga. App. 571 (84 S. E. 69)
VERDICT: $10,000.00

2) WESTERN & ATLANTIC RAILROAD CO. v JARRETT
22 Ga. App. 313 (96 S. E. 17)
VERDICT: $6,500.00

3) GEORGIA RAILWAY & POWER CO. v SHAW
25 Ga. App. 146 (102 S. E. 904)
VERDICT: $5,000.00

4) OCILLA SOUTHERN RAILROAD CO. v TAYLOR
27 Ga. App. 733 (110 S. E. 244)
VERDICT: $10,000.00

5) GEORGIA RAILROAD & BANKING CO. v. FARMER
45 Ga. App. 130 (164 S. E. 71)
VERDICT: $15,000.00

6) GENERAL OIL CO. v. CROWE
54 Ga. App. 139 (187 S. E. 221)
VERDICT: $13,041.67

7) POLLARD v. KENT
59 Ga. App. 118 (200 S. E. 542)
VERDICT: $9,000.00

8) BLUE'S TRUCK LINES, INC. v. HARWELL
59 Ga. App. 305 (200 S. E. 500)
VERDICT: $35,000.00 reduced to $15,000.00

9) LEWIS v. WILLIAMS
78 Ga. App. 494 (51 S. E. 2d 532)
VERDICT: $7,500.00

Petitioners hint that the case of *Blue's Truck Lines, Inc. v Harwell, supra,* might justify the verdict in this case. It is true that the jury returned a verdict for $35,000.00, but the plaintiffs voluntarily wrote this verdict down to $15,000.00.

It appears from the original record on file in the Court of Appeals of Georgia that the deceased wife and mother was twenty-nine years old earning as a factory worker $1,100.00 to $1,200.00 per annum, and helped around the home in rearing five minor children. The decreased purchasing power of the dollar might affect an amount awarded for pain and suffering, but not the value of a life with shorter expectancy and only slightly higher earnings.

Hence, that decision condemns, instead of supporting, the verdict in the instant case.

The Appellate Courts of Georgia would not have permitted for one moment this verdict to stand. To say that the Circuit Court is powerless would violate *Erie Railroad v. Tompkins* (304 U.S. 64).

In the very recent case of *Swift & Co. v. Lawson, et al.*, 95 Ga. App. 35 (8); 97 S. E. 2d 168, decided in 1957, the Georgia Court of Appeals emphatically disapproved of and set aside a verdict for $80,000.00 for the homicide of a husband and father, who was thirty-eight years of age earning $3,600.00 per annum. It held that the verdict was grossly excessive as a matter of law.

Most assuredly the value of the life of the decedent in the instant case earning not even half as much as the husband in the reported case, with no greater expectancy, must of necessity be far less.

Petitioners' contention that the decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Neese v. Southern Railway Co.*, 350 U. S. 77 and *Snyder v. U. S.*, 350 U. S. 90, is imaginary. Those two cases involve the measure of recovery under the Federal Employers' Liability Act and the Federal Tort Claims Act.

In the instant case, there is no contention whatsoever that the Circuit Court did not faithfully and strictly follow the law of Georgia in setting this verdict aside. It is not contended that any Georgia decision has been flaunted or overlooked. On the contrary, the Circuit Court placed its decision squarely on the law and decisions of Georgia.

III.

THERE IS NO CONFLICT OF DECISION

The rule so carefully spelled out by the Court of Appeals in this case as to its right and duty to determine whether the District Court has abused its discretion in refusing a new trial on the alleged ground of excessiveness of the verdict is not in conflict with the decisions of the other circuits on that subject. The various circuits seem to be in complete accord.

"In previous decisions we have reviewed the action of the trial court only to determine whether or not it committed an abuse of discretion in denying a new trial on the ground that the damages awarded by the jury were grossly excessive . . ."

BALLARD et al. v. FORBES
208 F. 2d 883 (888) (1CCA)

"The matter of excessive damages is primarily within the discretion of the trial judge . . . though we may re-

view his decision for abuse of discretion."

COMINSKEY v. PENNSYLVANIA RAILROAD CO.
228 F. 2d 687 (688) (2CCA)

"Our function is to determine whether the verdict is so grossly excessive as to justify reversal on the ground that the denial of the motion for a new trial constituted an abuse of discretion."

BREST v. PHILADELPHIA TRANSPORTATION CO., 216 F. 2d 331 (332) (3CCA)

" . . . where a verdict is so excessive that it cannot be justified . . . it is the duty of the judge to set it aside. Failure to do so is an abuse of discretion, analogous to error of law, and as such reviewable on appeal."

VIRGINIAN RY. CO. v. ARMENTROUT,
166 F. 2d 400 (407) (4CCA)

"Where the jury's verdict resolves a factual question, the trial court's action in overruling such a motion cannot be reviewed by this Court unless it involves an abuse of discretion."

SPERO-NELSON v. BROWN, et al.,
175 F. 2d 86 (89) (6CCA)

"In pursuance of this authority, when it is obvious that the trial court has abused its discretion in denying a motion for a new trial based upon a claim of excessive damages, this court may reverse . . ."

BUCHER v. KRAUSE,
200 F. 2d 576 (588) (7CCA)

"We have consistently held that in a tort action, at least where the verdict is not such as has been designated by the United States Supreme Court as 'monstrous', or such as to shock the judicial conscience, the question of the

excessiveness of the verdict is to be determined by the trial court on motion for new trial . . ."

CHICAGO GREAT WESTERN RR. CO. v CASURA
234 F. 2d 441 (448-9) (8CCA)

"We have no hesitation in saying that such a verdict is grossly excessive, and that the refusal of the court to grant a new trial was such an abuse of discretion as is reviewable by this court on writ of error."

COBB v. LEPISTO,
6 F. 2d 128 (129) (9CCA)

"Our province is limited to determining whether the trial court, in denying the motion, abused its discretion."

CHICAGO, ROCK ISLAND & PACIFIC RR. CO. v KIFER, 216 F. 2d 753 (756-7) (10CCA)

"It appears clear that the rule in the Federal courts is that an appellate court may reverse, if at all, for excessiveness of verdict only where the verdict is so grossly excessive or monstrous as to demonstrate clearly that the trial court has abused its discretion in permitting it to stand."

HULETT v. BRINSON,
229 F. 2d 22 (25) (CADC)

Hence, there is no basis for the assertion that there is a conflict between the circuits on the subject.

IV.

THE DECISION BELOW DOES NOT CONTRAVENE THE SEVENTH AMENDMENT.

The Seventh Amendment has never stood in the way of a review by an Appellate Court of an abuse of discre-

tion by the trial court with respect to the grounds of the new trial on an issue of fact tried by a jury. The bar was set up under Sec. 22 of the Judiciary Act of 1789, which antedated the adoption of the Seventh Amendment by more than two years.

We call the court's attention to the scholarly and most exhaustive discussion of the Seventh Amendment and common law as it relates to Appellate review of factual issues by Judge Edwin R. Holmes of the Fifth Circuit in his dissenting opinion in the case of *Sunray Oil Corporation v. Allbritton*, 187 F. 2d 475 (p. 477-84).

The statement that a District Court is vested with a discretion to determine whether the verdict of the jury is inadequate or excessive makes it perfectly plain that the manner of his exercise of the right or duty is reviewable.

As said by this court in the case of *Langnes v. Green*, 282 U. S. 531, 75 L. ed. 520:

> "The term 'discretion' denotes the absence of a hard and fast rule . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result . . .
>
> "The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court."

See also *Yick Wo v. Hopkins*, 118 U. S. 356 (p. 369-70)

and *Jones v. Securities & Exchange Commission*, 298 U. S. (p. 1, 24).

The failure of the district judge to exercise his discretion with respect to the size of the jury's verdict is no more immune from examination by a Circuit Court than his failure to exercise that discretion as to any other issue of fact.

Indeed, the decision by this court in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, which is frequently cited as precluding a review by the Circuit Courts of the amount of the verdict clearly shows that the question of abuse of discretion by the district judge was not involved in that case. Justice Brandeis pointed out that the Circuit Court did not say that the district judge had abused his discretion. Here the Circuit Court has said specifically that the district judge did abuse his discretion.

Certainly, Judge Storey made no such holding in *Parsons v. Bedford*, 3 Pet. 433.

We don't believe that this court spoke carelessly through Justice Clark in *Affolder v. New York . . . Company*, 339 U. S. 96, in its statement that it agreed that the amount of damages was not "monstrous in the circumstances of the case." Its reliance of *Barry v. Edmund*, 116 U. S. 550, proves the contrary.

The decision of this court in *Galloway v. U. S.*, 319 U. S. 372, seems to us to constitute absolute authority that the Seventh Amendment never contemplated that it would be employed as an instrument to bar an Appellate Court's review of abuse of discretion by the trial judge.

V.

OTHER ERRORS REQUIRED A NEW TRIAL

Although the argument of counsel was not reported and although counsel for the petitioners in an affidavit filed thirty days after the trial denied that he made the argument, nevertheless, what the court reporter did record demanded the conclusion that highly prejudicial and inflammatory argument had been used by the attorneys for the petitioners.

The plea "to stop these large trucks from running people off the highway" was without evidentiary basis.

True, the petitioners had plead, and proven, that the truck and trailer were of the maximum width and within one foot of the maximum length allowed under the laws of Georgia, but there was no proof that this defendant's trucks, although large, had run people off the highways.

The Court of Appeals of Georgia in an identical case granted a new trial for this type of argument alone even though the trial judge had severely rebuked the attorney. *Southern Stages, Inc. v. Brown*, 76 Ga. App. 694; 46 S. E. 2d 765. This court has condemned such arguments. *New York Central Railroad v. Johnson*, 279 U. S. 310 (6 & 7).

Likewise the admission of the experiment made by the sheriff as to the distance a Farmall Tractor could be seen was prejudicial and error. The conditions under which the experiment was conducted were materially different.

See *Freightways, Inc. v. Stafford*, 217 F. 2d 831 (8) (8CCA), and *DeLoach Mill Manufacturing Co. v. Tutweiler Coal . . . Co.*, 2 Ga. App. 493 (3); 58 S. E. 790.

A new trial should have been granted on account of the repugnancy of the verdict.

In the case of *Happy Valley Farms, Inc. v. Wilson,* 192 Ga. 830; 16 S. E. 2d 720, the Supreme Court of Georgia held that the negligence of the husband did not bar the recovery by the child, although under the law of Georgia the suit must be joint. It went on to hold that if the husband was negligent, but not to the extent of the defendant, the verdict for the husband should be diminished in proportion to his negligence.

The jury by its verdict found that the husband was negligent. The wife and mother had to be guilty of the same degree of negligence in that she was standing directly behind the white light and had to know she was riding on a vehicle which was being operated in violation of law.

See *Blashfield's Cyclopedia of Automobile Law and Practice,* Vol. 4, Part 1, P. 329, Sec. 2292, and *Wilson v. Loewus,* 56 Ga. App. 738 (4); 193 S. E. 793.

Hence, a verdict finding the mother free from negligence in the face of its finding that the husband was negligent is inconsistent, repugnant and void. *Pickron v. Garrett,* 73 Ga. App. 61 (3); 35 S. E. 2d 540, and *Southern Railway Co. v. Harbin,* 135 Ga. 122; 68 S. E. 1103.

The failure of the trial judge to have the argument of counsel reported was error which under the circumstances in the instant case demands a new trial. It was argued in the Circuit Court by petitioners that counsel for respondent did not request the argument to be reported. The law places no such burden upon counsel. Title 28, Sec. 753 (b) U.S.C.C.A., and *Marron v. Atlantic Refining Co.,* 176 F. 2d 313 (p. 315) (3CCA), and *Stanbury v. United States,* 219 F. 2d 165, (p. 169).

CONCLUSION

Respondent most respectfully urges that justice required the grant of a new trial and that this court should not grant the writ of certiorari.

Respectfully submitted,

CUBBEDGE SNOW

T. ROSS SHARPE

PHILIP S. RINGEL

ALVIN L. LAYNE

T. BALDWIN MARTIN

Attorneys for Respondent.

T Baldwin Martin